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In the

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

BOREK MOTOR SALES, INC.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT (AND APPENDIX)

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NATIONAL LABOR RELATIONS BOARD,

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Borek Motor Sales, Inc., prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit enforcing an order of the National Labor Relations Board that petitioner reinstate an employee allegedly discharged because of activities in American Federation of Professional Salesmen, Local 5056, unaffiliated.

## Opinions Below

1. The decision of the Trial Examiner is not yet officially reported and appears at p. 1a of the Appendix hereto.

2. The decision of the National Labor Relations Board is not yet officially reported and appears at p. 34a of the Appendix hereto.

3. The three opinions of the Judges of the Court of Appeals are not yet officially reported and appear at p. 37a of the Appendix hereto.

## Jurisdiction

The judgment (p. 48a, *infra*) of the Court of Appeals was entered May 13, 1970. Jurisdiction of this Court is involved under 28 U.S.C. 1254(1).

## Questions Presented

1. Are the purposes of the National Labor Relations Act effectuated when the National Labor Relations Board employs its processes to protect activities on behalf of an asserted labor organization of retail automobile salesmen which proposes to achieve so-called normal labor objectives through a conspiracy, obnoxious to the Sherman Act, to fix retail prices of automobiles under a formula that will guarantee a stipulated margin of profit for the dealer and labor benefits for the salesmen?

2. May the Labor Board, consistently with the Administrative Procedure Act, overrule all exceptions to a Trial Examiner's Decision with respect to an independent branch of a case with no statement of its reasons or basis for so doing.

3. Is the Board's finding that an automobile salesman was discharged to discourage membership in a labor organization supported by substantial evidence on the record considered as a whole?

## Statutes and Rules Involved

Administrative Procedure Act, 80 Stat. 387, 5 U.S.C. § 551 *et seq.* Section 7 is printed at page 50a of the Appendix hereto.

National Labor Relations Act, 61 Stat. 136, 29 U.S.C. § 151 *et seq.* Pertinent parts of Sections 7, 8(a)(1) and (3), and 10(c) and (e) are printed at page 49a of the Appendix hereto.

Sherman Act, 26 Stat. 209, 15 U.S.C. § 1 *et seq.* Section 1 is printed at page 53a of the Appendix hereto.

NLRB Rules and Regulations, Series 8, Sections 102.46(b), (c) and (h) and 102.48(c), 29 C.F.R. §§ 102.46(b), (c) and (h) and 102.48(c). These rules are printed at page 52a of the Appendix hereto.

## Statement of the Case

This case is companion (and was so treated below) to *Schmerler Ford, Inc., et al.* v. *National Labor Relations Board* now pending in this Court on petition for certiorari under the docket number immediately preceding the number of this case. The facts with respect to the price-fixing conspiracy are the same and in the interest of brevity will not be repeated. If this Court grants certiorari in *Schmerler* the first of our "Questions Presented" will be present here. If certiorari be denied in *Schmerler* then, consistently, it should be allowed here only on the second and third "Question Presented."

Apart from the anti-trust question there are independent reasons for allowance of the writ:

The Labor Board issued a complaint alleging that petitioner, a Blue Island (suburb of Chicago), Illinois, Pontiac automobile dealer, violated Section 8(a)(1) of the National Labor Relations Act through a statement by its sales manager on November 15, 1967 that he would fire salesman Ralph Teeter if he signed a membership application card for American Federation of Professional Salesmen. (Teeter promptly signed but was not fired until nearly two months later.) His discharge on January 8, 1968 was alleged to violate Section 8(a)(3).

The Board and a majority of the Court of Appeals held both the 8(a)(1) and the 8(a)(3) alleged violations were proved. The dissenting Judge of the Court of Appeals held that although Farino did say that he would fire Teeter if he signed a card that any adverse effects therefrom were purged or dissipated by an announcement of the president of the company a week later assuring the salesmen of their right to join. All joined. The dissenting Judge held that Teeter's subsequent discharge was for "valid, well-supported, economic reasons,"—poor sales effort and poor sales result.

The proof recited in Judge Hastings' dissent, showed that in the spring of 1967 the agency suffered an unusual sequence of deaths amongst the leaders of its sales force. This required a rebuilding of the staff. Sales of new cars in the last six months in 1967 declined to 30% of what they had been in the same period in 1966.

Teeter was hired about September 18, 1967 as a supposedly trained, professional salesman to replace one of the dead men who had been selling 25 to 30 cars a month. His goal was 25 sales a month. At the end of October, Farino, the sales manager, was displeased with Teeter's

performance and gave him a quota of 15 new and 3 used cars for the month of November. This was before anyone had heard of the alleged labor organization. The president of the company began complaining of Teeter's performance but Farino kept him on, waiting for him "to break loose." He didn't. During the period September 18, 1967 to December 31, 1967, Teeter sold only 21 new cars, whereas the other two trained regular salesmen sold 54 and 47, viz he was only 41% effective as the others (App. 56a). He was told he was dismissed for poor performance.

The divergence of the facts just stated from those presented by the lead opinion of the Court of Appeals arises from the handling of the case, so far as the 8(a)(3) issue is concerned, in disregard of the requirement of the Administrative Procedure Act that the Board state the reasons for its actions on Exceptions. The record developed as follows:

The Trial Examiner rendered a shockingly erroneous decision in which he stated that the agency involved was located in Chicago, rather than in Blue Island, Illinois. This geographical error placed wholly out of focus remarks of the president of the company as to the shopping options of potential customers who might shop for autos in Hammond, Indiana, or Joliet or Kankakee, Illinois, communities near Blue Island. Secondly, the Trial Examiner converted the remarks as to *customers* exercising the option of shopping in nearby communities *into a threat by Borek to move his distributorship, if it was organized*, to one of those communities (App. 12a). Actually all witnesses, Board's and petitioner's, questioned on the subject, agreed that in his remarks Borek was not anti-union and told the salesmen they had the right to organize which nobody could take away from

them. Detailed exceptions were filed to the Examiner's Decision. The Board corrected the above two findings but did not change the Trial Examiner's recommendation for reinstatement. The Board's Decision (App. 34a) dealt only with the exceptions going (a) to the anti-trust point and (b) to the claimed violation of Section 8(a)(1). It said literally *nothing* about the exceptions on main issue, the 8(a)(3) alleged violation. The case thus came to the Court of Appeals with no explanation from the Board as to why it upheld the Trial Examiner's recommendation that Teeter be reinstated.

In the Court of Appeals petitioner did not, as asserted by the lead opinion, claim that the Board was required to state its reason for overruling "each exception pertaining to the discriminatory discharge issue." It asserted only that the Board was required to "make the basis of its action" in overruling exceptions on the discharge issue "reasonably clear" within the meaning of the rule in *NLRB* v. *Metropolitan Insurance Company*, 380 U.S. 438, and asserted that this was "no arduous requirement."

Petitioner also pointed out that when the Board, on the 8(a)(1) branch of the case, corrected the Trial Examiner's outrageous finding as to Mr. Borek's speech and recognized that the speech was not anti-union, it knocked out the necessary motive underpinning for the 8(a)(3) branch of the case, for Borek, not Farino, was the man who gave the order to fire Teeter.

The lead opinion, instead of reversing the Board for failing to give any explanation whatsoever as to why it upheld the 8(a)(3) branch of the case, went on to make a detailed examination of the record, and came up with a rationalization that even the Trial Examiner had not made. Since the Board on the 8(a)(1) branch of the

case had destroyed what the Trial Examiner had found to be an anti-union speech by Mr. Borek, the lead opinion filled the void by interpolating words and a meaning into other testimony as to a different remark by Borek. The interpolation gave the testimony an anti-union inference. The lead opinion ignored the basic rule that "testimony must be viewed in its entirety" (*N.L.R.B.* v. *Newberry Equipment Co.*, 401 F. 2d 604, 609, 8th Cir., 1968). The lead opinion says that Borek "* * * said 'he wouldn't want to be a victim of the one individual [on the opposing team], which would be joined in the union.'" (App. p. 38a) The interpolated phrase reversed the meaning of the testimony and seems to be the "other indicia of anti-union bias" which the lead opinion found (App. p. 42a). Actually the witness who gave the testimony into which the lead opinion engrafts the interpolation testified "I have never heard Mr. Borek elaborate on the good or the bad of the union" and, "Mr. Borek * * * did not lay a stone in my way, nor did I hear him make a statement to any of the men that he disagreed with the union." The complete passage appears at App. 54a-55a.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Although this Court has said that it relies primarily upon the Courts of Appeals for superintendency over the Labor Board's fact finding duty, the Courts of Appeals themselves may stray in discharge of their own duty and require guidance (*N.L.R.B.* v. *Raytheon Corporation*, No. 440, this term).

This case presents a situation in which the requirement of the Administrative Procedure Act that an administrative agency give some explanation or rationalization of

its action was erased as to an entire and separable branch of the case—the 8(a)(3) charge. The majority of the Court then set out, in effect, to pass upon the Exceptions to the Trial Examiner's Decision, for the Board itself had said nothing about them insofar as they pertained to Teeter's discharge. Having placed itself in the position of the Board, the majority should have tested the Trial Examiner's findings under the test the Board was bound to apply under Section 10(e) of the Act, *i.e.*, were they supported by "*the preponderance of the testimony.*" Instead, the majority found only that "considering the totality of the evidence" they were supported "by substantial evidence." In reaching that conclusion the majority *did not follow the Trial Examiner's theory* that Teeter had not proved to be a poor salesman but went to a theory that "there was substantial evidence from which the Board reasonably inferred that the discharge was not based solely upon that ground and was therefore illegal." (App. p. 42a) *The trouble is that the Board stated no such theory or "inference" at all.*

While we believe there is not a scintilla, much less substantial evidence that Teeter was discharged to discourage union activities, the extra vice of the majority's mode of review here springs from excusing the Board from its duty under the Administrative Procedure Act and then creating findings or reasons for the Board that neither it nor the Trial Examiner stated.

Litigants are entitled to a better mode of review than that. A business man, struggling to restore an ailing business, is entitled to more responsible treatment by judges who tell him he must take back an ineffective salesman.

1. *It does not effectuate the rightful purposes of the Labor Act to protect activities on behalf of a labor*

*organization which proposes to engage in an illegal price-fixing conspiracy.* The purpose of Section 8(a)(3) of the Labor Act forbidding employers to discriminate against employees "to encourage or discourage membership in any labor organization" is not primarily "for the adjudication of private rights" but is "to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce" (*National Licorice Co.*, v. *N.L.R.B.*, 309 U.S. 350, 362). If an organization proposes to violate public policy, association in such an endeavor, particularly one to restrain commerce should not be protected. In *N.L.R.B.* v. *Fansteel Metallurgical Corporation*, 306 U.S. 240, "sit-down" activities removed employees from the protection of the Act, mutiny did the same in *Southern SS Co.* v. *N.L.R.B.*, 316 U.S. 31, as did a strike to force an employer to grant a wage increase in violation of wage stabilization laws in *N.L.R.B.* v. *Indiana Desk Co.*, 149 F 2d 987 (7 Cir., 1945).

The Board has developed a considerable list, too lengthy for a certiorari petition, of "protected" or "unprotected" activities. The Court of Appeals for the District of Columbia has pointed out in *Local Union 1229* v. *N.L.R.B.*, 202 F2d 186, 188 (1952) that protection under the Act is withdrawn from concerted activities which contravene "specific rules of other Federal or local law that is not incompatible with the Board's governing statute."

Presumably the Court will decide in *Schmerler Ford Inc., et al.* v. *N.L.R.B.*, companion to this case, whether the anti-trust question here merits certiorari. If it holds it does, it should grant certiorari on question No. 1 here to determine whether activity on behalf of a union engaged in an anti-trust conspiracy should be treated as protected activity under the Labor Act.

2. *The doctrine of the majority opinion that the Administrative Procedure Act "only requires the Board to rule on each exception, not to state the reasons therefor"* (App. p. 43a) *is contrary to the words of the statute and to this Court's decision in N.L.R.B. v. Ins. Co., 380 U.S. 438 that the Board must "disclose the basis of its order."* Title 5 U.S.C.A. Sec. 557(c), states in relevant part:

> "The record shall show the ruling on each finding, conclusion, or *exception* presented. *All* decisions, * * * shall include a statement of—
>
> (A) findings and conclusions, *and the reasons or basis therefor*, on all the material issues of fact, law, or discretion presented on the record." (Emphasis supplied.)

The statute is unambiguous: it says *all decisions shall contain a statement of reasons.*

In this case at least 12 of petitioners' 38 Exceptions to the Trial Examiner's Decision went solely to the 8(a)(3) issue. Those exceptions, as required by Board Rule 102.46(b), set forth the portions of the decision to which exception was taken, reasons therefor and citations of the record. The exceptions presented issues which could be framed only *after* the Trial Examiner's decision and the flaws in it had appeared.[1] The Board's gambit of adopting Trial Examiner's findings in bulk with no statement of reasons as to why they are valid against exceptions lodged to them deprives litigants and courts of views the Board should express. The purpose of the Administrative Procedure Act requirement that adminis-

[1] Most of the exceptions going directly to the 8(a)(3) issue appear in the appendix hereto commencing at p. 21a. They are detailed and factual. It is a fair assumption that the Board did not comment on them because it could find nothing wrong with them.

trative agencies state the basis for their actions is to sharpen and frame the issues for possible court review.

The majority of the Court of Appeals bases its doctrine that the Administrative Procedure Act only requires the Board to *rule* on each exception and does not require it to give *any statement of its reasons* for so doing, upon the Seventh Circuit decision in *N.L.R.B.* v. *Process Corporation*, 412 F 2d 215, 217 (1969) and on pronouncements of certain other Circuits. However, the Seventh Circuit decision in *Process Corporation* was erroneously based on a Seventh Circuit decision handed down in 1943 some three years before the Administrative Procedure Act was adopted in 1946, *N.L.R.B.* v. *Jasper Chair Co.*, 138 F 2d 756. *Jasper Chair*, decided on the limited form of review called for by the Wagner Act, furnished no support for the Seventh Circuit's subsequent *Process Corporation* decision which should have, but did not, consider the Administrative Procedure Act. *Process Corporation* thus furnishes no proper support for the present decision's doctrine circumscribing the reform Administrative Procedure was designed to bring about. (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474)

Other Courts of Appeal take a position in direct conflict with that taken by the majority in this case. *Pepsi-Cola Buffalo Bottling Co.* v. *N.L.R.B.*, 409 F. 2d 676, 680, (2 Cir., 1969); *N.L.R.B.* v. *Clement-Blyth Companies*, 415 F. 2d 78 (4 Cir., 1969). This line of authority opposing the doctrine announced in majority decision here is based on this Court's announcement in *N.L.R.B.* v. *Metropolitan Ins. Co.*, 380 U.S. 438; *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 195; *Burlington Truck Lines* v. *U.S.*, 371 U.S. 156; *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 196. The rule of the opposing line is tersely stated by the Court of Appeals for the District of Columbia in *Radio Station KFH* v. *Federal Communications*

*Comm'n., D. C.*, 247 F. 2d 570 (1957) as follows at page 572:

> "Though a specific ruling on each minor exception is not indispensable, the parties and the court should not be left to guess, with respect to any material issue, or to any group of minor matters that may have cumulative significance, which of several alternatives the Commission had in mind. It should make the basis of its action reasonably clear. We cannot find that it did so here. Its statement of reasons comes to little more than this: For one reason or another, all the exceptions not granted are overruled. This court must therefore remand the case to the Commission. *Baltimore & O. R. Co.* v. *United States*, 3 Cir., 201 F. 2d 795, 797-800."

We respectfully suggest that the cases from the various circuits are in disarray. This Court in *Universal Camera* v. *N.L.R.B.*, 340 U.S. 474 went to some lengths to point out that the Administrative Procedure Act cannot be ignored but must be taken into account in Labor Board cases. The time has come when this Court should resolve the conflict and speak authoritatively as to whether the Labor Board may simply adopt in bulk a Trial Examiner's decision on a major branch of a case with utterly no statement of the basis on which it found exceptions, attacking that portion of the decision, to be without validity.

3. *Where the Board has found that the chief executive of a company, who directed the dismissal of an employee for poor performance, had no anti-union animus, it cannot be said that a finding that the employee was discharged to discourage participation in a union is supported by substantial evidence on the record considered as a whole, even if it be assumed that a subordinate official had anti-union animus.* In *Universal Camera Corp.* v. *N.L.R.B.*,

474, 489, this Court recognized that the "legislative history of [the Administrative Procedure Act and the Taft-Hartley Act] demonstrates a purpose to impose on courts a responsibility which has not always been recognized." That responsibility was not recognized by the majority of the Seventh Circuit Court of Appeals in this case.

The record is without contradiction that Teeter, supposed to be a trained professional salesman, proved to be a poor performer regardless of whatever hopes may have been held out for him he was hired (See App. 56a). The record is clear that Mr. Borek, the head of the business and the man who insisted that Teeter be dismissed, was not anti-union. The Board did not find him so to be. It held that the Trial Examiner's finding that Borek had threatened to move his agency, if it was organized, was contrary to the evidence. While the Board found that Farino's remark to Teeter that he would fire him if he signed a union card, constituted a violation of Section 8(a)(1) and that the effect of that remark was not erased by Borek's subsequent assurance to all of the salesmen that they had a right to join the union, that remark by Farino, as pointed out by the dissenting opinion, cannot be used to prove anti-union animus on the part of Mr. Borek in ordering Teeter's dismissal. Yet it was so used by the majority here which said, "In addition to Farino's threat to fire Teeter there was evidence from which the Board could have inferred that the company through Farino" was aware of Teeter's continued activity with the union. There are at least three things wrong with that, all of them violative of proper standards of review. *First*, the question is not what the Board *could* have done, but what did it *actually do and find? Second*, in any event Teeter's activities with the union were minimal and certainly no greater than

those of any of the other salesmen. *Third*, and most important, the majority's reasoning is all directed at Farino who was seeking to have Teeter kept on as a salesman, continuously hoping he would improve. As the dissenting opinion points out "It was Borek, not Farino, who had insisted upon the discharge." And the "burden [was] upon the Board to show by preponderance of the evidence that the unlawful motive was discriminatory and did, in fact, result in the discouragement of union membership" (*Banner Biscuit Co.* v. *N.L.R.B.*, 356 F.2d 765, 770, 8 Cir., 1966; see also *N.L.R.B.* v. *Brown*, 380 U.S. 278, 286.) The anti-union motive was not proved. There is simply no evidence, substantial or otherwise, that Borek had Teeter discharged in order to discourage activities in the union.

If proper standards of review are to be upheld and Courts of Appeal are to be held to discharge fairly the responsibilities which *Universal Camera* says rest upon them, this Court should correct a Court of Appeals that strays as far from proper modes of review as the majority did in this case.

Respectfully submitted,

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## Appendix (Part 1)

### TRIAL EXAMINER'S DECISION:

(Caption Omitted)

STATEMENT OF THE CASE.

Max Rosenberg, Trial Examiner: This proceeding, with all parties represented, was tried before me in Chicago, Illinois, on April 15 and 16, 1968, pursuant to a complaint filed by the General Counsel of the National Labor Relations Board and an answer thereto by Borek Motor Sales Inc., herein called the Respondent, or the Company.[1] At issue is whether Respondent violated Section 8(a)(3), of the National Labor Relations Act, as amended, by discharging Ralph E. Teeter because he had engaged in activity protected by the statute, and whether it independently violated Section 8(a)(1) by other conduct to be detailed hereinafter. At the conclusion of the hearing, the parties waived oral argument. Briefs have been received from the General Counsel and the Respondent, which have been duly considered.

Upon the entire record made in this proceeding and my observation of the witnesses, including their demeanor while testifying on the stand, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS.

I. The Respondent's Business.

Respondent, a corporation duly organized under the laws of the State of Illinois, maintains its principal office and place of business in Chicago, Illinois, where it is

[1] The complaint, which issued on February 29, 1968, is based upon charges and amended charges which were filed on January 9, 1968 and February 23, 1968, respectively, and were served on January 11, 1968 and February 24, 1968, respectively.

engaged in the sale and servicing of automobiles. During the annual period material to this proceeding, and in the course and conduct of its business, Respondent received automobile and automobile parts valued in excess of $50,000, which were shipped to its place of business from sources located outside the State of Illinois. During the same period, Respondent's gross volume of business, consisting of sales and the servicing of automobiles, exceeded $500,000. The complaint alleges, the answer admits, and I find that this entity is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

Respondent asserts that the Charging Party, American Federation of Professional Salesmen Organizing Committee, Local 5056, Communications Workers of America, AFL-CIO, is not a bona fide labor organization within the purview of Section 2(5) of the Act because (1) it no longer exists, and (2) it seeks to foist a price-fixing program upon automobile dealers in the Chicago area in violation of the Federal Anti-trust Laws. With respect to the first assertion, the record establishes that, on November 1, 1967, the Communications Workers of America, AFL-CIO, herein called CWA, which is concededly a labor organization within the meaning of the Act, issued a charter to an entity styled as the Charging Party whose avowed purpose was to organize all the professional salesmen in the automobile field throughout the States of Illinois, Indiana and Wisconsin in order to form a labor organization to negotiate with their employers concerning wages, hours, and other terms and conditions of employment. By January 1968, the Charging Party had enlisted the support of approximately 300 salesmen. Shortly prior to January 28, 1968, the Charging Party mailed a notice to its members and other salesmen announcing that "Your organizing committee has reached the point in their organizing drive where the automobile salesmen in Northern Indiana and The Greater Chicago Area, now have a union." The notice invited attendance

at a meeting to be conducted on January 28, 1968 to structure the fledging organization with permanent officers and committees, and to enact its bylaws. At the meeting, attended by approximately 400 members, a constitution and bylaws were adopted and officers and an executive board were nominated. Because the CWA was unable to provide anymore funds to support the continued existence of the Charging Party, the members voted to disaffiliate from the former in consequence of which the Charging Party's charter was revoked by the CWA on January 31, 1968. However, the Charging Party has continued to exist and function *sub nom.* American Federation of Professional Salesmen, Local 5056, unaffiliated, herein called the Union, and has filed between 80 and 90 representation petitions with the Board seeking certification as the exclusive bargaining agent for its members.

In view of the foregoing, I find that the Charging Party was a labor organization within the meaning of the Act and that the Union, which succeeded to the mantle of the Charging Party by virtue of the disaffiliation action, is an organization in which employees participate and which exists for the purpose of dealing with employers concerning wages, hours and other terms and conditions of employment and is therefore also a labor organization under Section 2(5) of the statute.

Regarding the second assertion, Respondent points to the fact that, at the meeting called by the Charging Party on January 28, 1968 during which the Union came into existence, the president of the Charging Party proclaimed that his organization would seek to extract agreements from employers under which retail dealers would be required to have uniform percentages above factory cost for advertising, promotion, company profit, salesmen's commissions, and health, welfare, and retirement benefits, and salesmen would be prohibited from selling automobiles below prices pegged under that formula. Even assuming, *arguendo,* that the Charging Party's or the Union's bargaining platform constitutes an incipient "bold conspiracy" to violate the Federal Anti-trust Laws, as Re-

spondent puts it, the power to deal with such a matter is outside the statutory competence of this Trial Examiner or the Board.[2] Accordingly, I find no merit in this assertion.

III. The Alleged Unfair Labor Practices.

The General Counsel contends that Respondent violated Section 8(a)(3) of the Act by discharging Ralph E. Teeter on January 8, 1968, because he joined and assisted the Union, and/or because he engaged in other concerted activities protected under the Act. The General Counsel further contends that the Company offended the provisions of Section 8(a)(1) by threatening employees with discharge for engaging in concerted, protected activities, or for assisting and supporting the Union. For its part, Respondent asserts that Teeter was terminated solely because he "failed to live up to expectations" as an automobile salesman and exhibited "a harmful negative attitude" toward established sales policies. It further denies the commission of the other alleged unfair labor practices.

Respondent maintains a new and used automobile sales agency in Chicago, Illinois, where it operates under a Pontiac franchise granted by General Motors Corporation. It is undisputed and I find that, before he entered Respondent's employ on September 18, 1967, Teeter had worked for 23 years in the retail automobile sales business as a salesman, sales manager, and agency dealer. In early September 1967, Teeter received a telephone call from Al Donohue, a salesman at Respondent's showrooms. During their conversation, Donohue reported that an opening existed on the sales staff. Because Donohue

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[2] Cf. *Alto Plastics Manufacturing Corporation*, 136 NLRB 850.

As I have heretofore found that the Charging Party continued in existence after January 28, 1968 *sub nom.* the Union, reference hereinafter shall be made to the latter organization.

painted a "rosy" picture of sales' prospects and working conditions, and in view of the fact that Respondent's showroom was conveniently located about eight blocks from Teeter's residence, Teeter followed Donoflue's suggestion to visit the showroom for an interview with Respondent's general manager, Robert Farino. Teeter did so and, after speaking with Farino and exploring the conditions of employment which existed at the facility, Teeter decided to accept the job offer if approved by Respondent's President Ted Borek, even though he would initially earn considerably less than at his present employment. Farino then spoke with Borek concerning the acquisition of Teeter. By his own testimonial admission, Farino was "quite pleased" that Teeter had indicated a willingness to work for the Company, and the former recommended to Borek that Teeter "was a professional salesman, that he was supposed to be a pretty good salesman, too." Whereupon, because of Teeter's acknowledged qualifications in the field, he was offered an immediate position on Respondent's sales force.[1] However, he harbored an obligation to afford his current employer a week's notice of his departure and, despite Farino's entreaties to assume his duties at once, Teeter and Farino agreed upon a September 18, 1967 starting date.

It is also uncontroverted and I find that, during the first week in November 1967, the Union launched an organizational campaign to enlist the collective support of automobile salesmen in the Chicago area. On or about November 15, 1967, a salesman from another Pontiac agency drove onto Respondent's premises where he was observed by Salesman Ralph Ambriz who was also Respondent's Used Car Manager. Ambriz was beckoned by his counterpart, left the showroom, and received between six and eight envelopes which contained Union literature and authorization cards. According to Ambriz, he had previously heard of the Union's organizational efforts but had never before been approached by a Union agent

[1] In Farino's words, "He [Teeter] got me so excited I wanted to start him the next day."

or received any information concerning the campaign. Ambriz carried the envelopes into the showroom where he was met by several of his fellow salesmen, including Howard Riley, Donohue, and Teeter, who inquired into what Ambriz was bearing. The latter explained that the documents in his possession contained Union literature, and he thereupon distributed envelopes to Riley, Donohue and Teeter. It is Ambriz's undenied testimony and I find that he and the other salesmen congregated in a group and commenced to discuss the contents of the packages, at which juncture Farino emerged from his office and approached the assemblage. Farino asked Ambriz what the latter had in his possession and Ambriz replied that he held letters from the Union which contained literature and authorization cards. Ambriz testified that Farino seized the remaining envelopes from Ambriz' hand, a maneuver which surprised Ambriz because he had not had an opportunity thoroughly to read the material. After Farino obtained the envelope which, according to Ambriz bore the name and address of the Union, Farino walked by Teeter who was leaning against a vehicle reading the contents of the envelope at a distance of 5 or 6 feet from where Ambriz was standing. As he encountered Teeter, and according to Ambriz' testimony, Farino remarked to Teeter that "if you are going to sign, don't bother then, because I'll fire you first."

It is Ambriz' further testimony that Farino's confiscation of the envelopes further aroused his curiosity, in consequence of which he entered Farino's office approximately 45 minutes later and noticed that the envelopes had been thrown into a wastebasket. Ambriz retrieved two of them and returned to the showroom where he gave one to Riley and retained one for himself for further study. On November 17, 1967, he received signed authorization cards from Riley, Donohue, Teeter and possibly Salesman Sam Conti and, together with his own executed designation, he placed them in a single envelope which he dropped into Respondent's mailbox for posting

to the Union. Not having received any acknowledgement from the Union that their signed designations had reached that organization, Riley telephoned the Union's offices to inquire into the matter and was told that the cards had not arrived and was instructed to execute new authorizations which the men subsequently did.[5] These were turned over to Riley for mailing to the Union.

Riley and Teeter generally corroborated the testimony of Ambriz as to the events which transpired on or about November 15, 1967. Thus, Riley testified that he observed Ambriz receive envelopes from some strangers at his showroom which contained Union literature and authorization cards, and Riley was handed one such envelope. As he was leaving the showroom to take his lunch break on that date, he walked past Farino, Ambriz and Teeter who were engaged in a conversation and he overheard Ambriz mention to Farino something about "union guys" on the premises. Riley then heard Farino, who had his gaze fixed on Teeter, say to the latter, "Let me know if you are going to sign and that I will fire you." When he returned from lunch, he was informed by Teeter that Teeter had obtained an extra card from the wastebasket which he had placed in Riley's desk for signature. Riley then executed the designation and returned it to Ambriz who placed all of the signed cards in a single envelope and dropped it into the company mailbox. Several days later, Riley telephoned the Union to inquire whether the cards had been received and was told that they had not. After being advised to sign new authorizations, the men did so and they were mailed directly to the Union.

[5] The record shows and I find that Ambriz signed a second card on December 4, 1967 and Riley signed on December 5 of that year. Teeter testified that, when he received the Union envelope from Ambriz on November 15, 1967, he executed it on November 17, 1967, and posted it directly to the Union, after which received an acknowledgment of this action from the Union. The record establishes the foregoing and I so find.

Regarding this episode, Teeter testified that he had been handed an envelope by Ambriz on November 15, 1967 and had proceeded to read a pamphlet contained therein when he was approached by Farino who attempted to snatch it from his hand. Within earshot of Ambriz, Teeter protested that he had not had an opportunity to read the document, to which Farino replied, "Let me know if you are thinking about signing this and I'll fire you." Teeter then proceeded to his desk where he read the pamphlet. Later that day, he entered Farino's office where he obtained two union envelopes from Farino's desk which Farino had confiscated from Ambriz earlier, and inserted one of these into Riley's desk drawer. Two days later, on November 17, 1967, Teeter signed his card and mailed it to the Union, from which he received an acknowledgment a few weeks thereafter.

When called to the stand, General Manager Farino admitted that, on a date in November 1967, he approached Ambriz on the sales floor and noticed that Ambriz had some envelopes in his hand. According to Farino, Ambriz told the former that the envelopes contained union literature and Ambriz voluntarily turned over these items to Farino. Upon learning the nature of the literature, Farino claimed he told Ambriz, "Fine, if you want to read them, read them." Yet, despite this asserted assurance, Farino further testified that "Then he [Ambriz] proceeded to give them to me and I took them and put them on my desk as I was going into my office." When queried as to whether he noted the Union's name and address on the envelopes, Farino initially replied that the envelopes were "Absolutely plain" and then confessed that "I didn't pay that much attention." During his conversation with Ambriz on this occasion, Farino acknowledged that he observed Teeter on the premises. However, Farino insisted that he did not engage in any discussion with Teeter on this date and that he did not see Teeter reading any material. Farino was then questioned as to whether he entered into any conversations concerning the Union thereafter with his salesmen, and he stated that, a day

or two after he talked with Ambriz, "I think I asked him what it was all about," a reference to the fact that the envelopes had disappeared from his desk, but Farino was unable to identify the man whom he referred to as "him." When asked whether he had spoken with Salesman Sam Conti a few days after the Ambriz incident, Farino initially responded in the negative. He then confessed that he had such a conversation during which Conti "asked me if he should join [the union] or not," and Farino advised that "it was entirely up to him, it was a free country, whatever he thought was best." Finally, Farino testified that he never observed a union-addressed envelope in his mail box and knew of no one who might have removed such a document from his box but then admitted that there was "a possibility" that this intelligence might have reached his ears.

Sam Conti was called to the stand by Respondent in support of its defense to this action. Conti was reemployed by Respondent as a salesman on November 7, 1967, after previously having served on its sales force for 9 months between 1964 and 1966. He testified that, on or about November 15, he met with a group of salesmen on the showroom floor to discuss the Union literature which he apparently had received from Ambriz, at which time Farino appeared on the floor. When queried as to whether he observed Farino converse with Teeter on this occasion and threaten Teeter with discharge if he signed a union authorization card, Conti at one point replied that he did not see Farino talk with Teeter and did not hear Farino make this threat, although Conti admitted that he was standing in a group which included Teeter, Ambriz and Riley. However, on further examination by Respondent's counsel, Conti conceded that he in fact was in the showroom at the time that Farino spoke with Teeter, but tempered this concession that with the statement that to his knowledge, Farino did not threaten Teeter with termination. Conti also testified that, later on the day when he received the union literature, he had a conver-

sation with Farino concerning the Union. According to Conti, he "hadn't been in the business too long" and he asked Farino what the latter thought of the Union. Farino stated that "he would like to go along with them. He wanted to join himself, he told me. He thought it would be a good thing if I did join. So, in turn, I did sign the card, not because of him, but because of my own thinking, too."

I credit the testimony of Teeter, Ambriz, and Riley on this issue, not only because they impressed me as forthright and honest witnesses, but also because the testimonial utterances of Farino and Conti lacked the ring of plausibility. While Farino admitted that he entered the showroom on a date fixed as November 15, 1967 and was advised by Ambriz that the latter had received union literature and authorization cards, and acknowledged that Teeter was in the showroom at the time, he denied that he had any conversation on this occasion with Teeter. Yet Conti, who was called as a witness on Respondent's behalf and who was present in a group which included Teeter, testified that Farino had indeed spoken with Teeter on that date. Further, Farino proclaimed that when he was told by Ambriz that the men possessed union pamphlets on Respondent's premises, he expressed pleasure at this happenstance and stated that "if you want to read them, read them." I deem it implausible that, with this assurance from Farino, Ambriz would then turn the documents over to his superior. Moreover, I consider it inherently improbable that Farino, as Conti testified, would have stated that he "wanted to join [the Union] himself" and that he "thought it would be a good thing if I [Conti] did join." I am fortified in this conclusion by the testimony of Respondent's President Ted Borek.

Borek testified that, on November 21, 1967, he sponsored a sales breakfast for his salesmen at a local hotel. A few days earlier he learned that a labor organization had undertaken to organize his salesmen by the distribution of literature and authorization cards. According to Borek,

"Ironically, the way I found out about this, a few days prior to this breakfast, I happen to open the door where this salesman, who was organizing my place. He was coming in with some packages and I held the door for him. I didn't know him. Mr. Farino called it to my attention, 'You opened the door for the organizer.' They were passing out literature to the men." In light of the fact that the evidence as a whole demonstrates that agents of the Union visited Respondent's premises on but one occasion during the organizational drive, which is fixed as November 15, I find that Borek's knowledge of the Union's activities as acquired on that date.

After the breakfast meeting with his salesmen opened on November 21, Borek turned to the topic of unionization of his business. As related by Borek, he decided on that "particular occasion I wanted to clear the air. It seems we are a small organization and close together. Men will come to you with all kinds of problems and figure you are the old man of the outfit, and you are glad to do this, when a child gets sick, I'm buying a home, you are always glad. It's a close-knit organization. All of a sudden a problem of this kind—the—not a problem, a situation of this kind comes up and they don't confide in you. All of a sudden the air is pretty thick. I don't know why it should be. I didn't like it." Borek went on to tell his men that "I hear something is going on. I want to tell you something about how I stand in this." Borek also stated that "If you are going to be a union man you better be a good one, because it takes this type of organizing, you are going to organize the entire state or none of us can stay in business. If you just organize a county, if you think we can economically add $25 to an automobile and stay in business, this man is going to go either to Hammond, Joliet, or Kankakee, or other places like this. If you are going to join the Union, be a good one." In view of Borek's knowledge, derived from General Manager Farino, that the Union was in the process of organizing Respondent's salesmen on November 15, 1967, it is reasonable to infer

and I find that Borek confided to Farino on that day the latter's sentiments concerning unionization. As Borek made it clear during his testimony regarding his speech to the salesmen at the breakfast on November 21 that he considered the Union's organizational endeavors "a problem" which he "didn't like" and that he was going to other locations unless the Union organized the salesmen at agencies throughout the State of Illinois, I cannot be led to believe that Farino would have encouraged Conti to sign an authorization card or indicated an interest in joining the Union.

In sum, I find that, on November 15, 1967, Respondent's salesmen received Union literature and authorization cards which they discussed in the showroom on that day, and that General Manager Farino immediately learned of this development. I further find that, upon observing that Teeter was perusing a union pamphlet on this occasion, Farino threatened the former with discharge if he signed the designation. By this threat, I conclude that Respondent thereby intruded upon the rights of its employees guaranteed in Section 7 of the Act to engage in concerted, protected activities and to join and assist the Union in obtaining exclusive representational status, and thus violated Section 8(a)(1) of the Act.

I next turn to the events leading to Teeter's discharge on January 8, 1968.

On Sunday, January 7, 1968, the Union scheduled a meeting of all salesmen in Chicago at a hotel at which its officers intended to explain the achievements which it had made in organizing the area's automobile agencies. Ambriz testified that, near the close of business on the preceding Saturday, Farino approached Ambriz at his desk and inquired about a Union meeting to be held the following evening. Farino pressed Ambriz for the names of the employees who were expected in attendance, and asked what time the meeting had been scheduled for because Farino desired to attend. These inquiries startled

Ambriz because he knew that Farino would have been opposed to the gathering. Ambriz did not wish to engage in such a dialogue and at this juncture the conversation terminated without Ambriz' responses inasmuch as someone interrupted the colloquy. According to the testimony of Teeter, he, Riley, Ambriz, Donohue and Conti made plans on Saturday, June 6, 1968, to attend the meeting and Ambriz volunteered to drive the men to the affair. It is undisputed and I find that these five men went to the meeting as planned.

In his testimony on this subject, Farino denied that he asked Ambriz whether there was a union meeting scheduled for January 7, denied that he inquired as to when and where the meeting was to be held, and denied that he asked whether Ambriz would attend any such meeting. According to Farino, the only conversation he had concerning the meeting was with Conti on Monday morning, January 8. During this conversation, Conti confided that there had been a union meeting the preceding evening "To organize a Union." Initially, Farino insisted that Conti did not inform Farino where the meeting was held or whether any of Respondent's salesmen had attended. However, he then stated that he did not know "for sure" if Teeter had gone to the meeting, and allowed as how he assumed that some of his men attended and some did not.

I do not credit Farino's testimony that he was ignorant of the identify of his salesmen who went to the meeting of January 7. As heretofore found, Farino knew that Ambriz exhibited some interest in the Union when Farino found him with union literature in the showroom on November 15, 1967, and Farino was aware of Teeter's interest when he saw the latter reading the union pamphlet at work and threatened Teeter with discharge if he executed a union authorization card. Moreover, Riley and Donohue were in a group of salesmen who discussed the union literature on November 15 and Farino had observed this. It is therefore not fanciful to assume that, when Farino learned from Conti on January 8 that there had

been a union organizational meeting; Farino had a good idea which of his salesmen had attended. Furthermore, I find it hard to believe that Conti, who had a predisposition for discussing union matters with Farino as evidenced by their conversation on November 15, would have volunteered the information that a union meeting which he attended had taken place the preceding day, but would have stopped short of imparting the intelligence that he was accompanied by Teeter, Ambriz, Riley and Donohue. Indeed, Conti failed as a witness to corroborate Farino's testimony that the former was told only that a meeting had taken place. In short, I am convinced and find that, on January 8, 1968, Farino knew that these five salesmen had gone to the gathering.

Teeter reported for work on January 18, 1968 at the appointed time. That evening, he was summoned into an office by Farino who notified him that he was being discharged. According to Teeter's testimony, he asked Farino for the reason for his separation, and Farino replied that he had not been selling enough automobiles. Teeter retorted that he ranked third among Respondent's salesmen in car sales, and had sold only three vehicles less than the top salesmen who had been with the Company for 7 years. After complaining that he took the job at Respondent's solicitation and at a considerable financial loss to himself, Teeter left the premises, never to return.

According to the testimony of Farino, Teeter's discharge was not a spurious happenstance and was unconnected with any union or protected activities in which Teeter might have engaged. Farino claimed that he and Borek had discussed Teeter's employment tenure in November and the greater part of December 1967 and that, at one point in November, Borek had tentatively decided to dismiss Teeter because of poor sales performance, but Borek "kept putting it off." Borek advised Farino to set a sales quota for Teeter for the months of November and December and to monitor the latter's performance, in consequence of which Farino fixed a quota of 18 new and used cars

for each month. Teeter did not make the quota and, about Christmas time, he became ill and stayed at home until the early part of January. Once again, Borek considered discharging Teeter but deferred taking this action until Teeter had another opportunity to prove himself. On January 8, Borek's patience became exhausted and he instructed Farino to terminate Teeter, which the latter did on that date.

If Teeter's lack of sales ability actually existed and persisted, then Respondent's defense that it separated him because he was an unworthy employee would possess the qualities of both plausibility and credibility. However, its sales records belie this defense. These records show that for October 1967, the first full month of Teeter's employment, he delivered to customers seven cars, Ambriz, a sales manager with 7 years' experience in the Pontiac line, delivered 24 automobiles, Chambers delivered 18 vehicles and Riley 13. For the month of November when Farino established a quota of 18 cars, only Ambriz and Riley met the quota, whereas Chambers and Teeter delivered 12 and 9 vehicles, respectively. In December, when a similar quota prevailed, not a single salesman reached it and Teeter ranked second in deliveries with 10 to Ambriz who had 12. Moreover, Farino testimonially conceded that Teeter had increased his sales production each month during his employment. Farino then made the curious comment that, when he discharged Teeter, he informed the latter that the failure to make his sales quotas "is not the objection so much," but that it was Teeter's refusal to send letters to and telephone prospective customers whose names appeared in a file which Respondent maintained. According to Farino, all of his other salesmen engaged in this practice and they were expected to perform these duties as part of their job in order to spur sales. Teeter maintained that he received this suggestion from Farino on but two occasions, once before Christmas in 1967, and again during his terminal interview with Farino on the night of January 8, 1968. On the occasion

before Christmas, Teeter told Farino that the time was not propitious for engaging in that activity because, with Christmas in the offing, "These people won't come in at this kind of season." By his own admission on the stand, Farino made the surprising comment that "I agreed when he told me this was the wrong time to do any such work." Moreover, Teeter stated that he did in fact mail out form cards provided by Respondent and that he paid the postage for them out of his own pocket.

After a careful review of all the evidence adduced in this proceeding, I am convinced and find that Teeter was discharged on January 8, 1968, not because he failed to measure up as a good salesman, but because he had engaged in activities protected under Section 7 of the Act. Teeter had extensive experience in the retail sale of automobiles and Farino was so impressed with the former's qualifications that he wanted to hire him immediately because he was a "professional salesman." So far as this record stands, not a single complaint was registered by Respondent against Teeter's sales performance until Farino observed him reading union literature in the showroom on November 15, 1967. As I have heretofore found, on this occasion Farino threatened to discharge Teeter if the latter signed a union card. Despite Teeter's alleged shortcomings during the months of November and December 1967, Respondent continued to employ him in January 1968 until it learned, on the date of his discharge, that he had attended a union meeting on the preceding evening. In my opinion, Respondent's asserted reason for Teeter's termination, namely, poor work performance, was merely a pretext to cloak its efforts to impinge upon Teeter's right to join or assist a labor organization and to engage in protected, concerted activities. Accordingly, I conclude that, by discharging Teeter, Respondent violated Section 8(a)(3) of the Act.

## IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent set forth in Section III, above, occurring in connection with the operations of Respondent set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

## V. The Remedy.

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have heretofore found that Respondent discriminatorily discharged Ralph E. Teeter on January 8, 1968, because he joined and supported the Union and otherwise engaged in protected, concerted activities. I shall therefore recommend that Respondent offer him immediate and full reinstatement to his former or substantially equivalent employment and make him whole for any loss of pay he may have suffered by reason of the discrimination practiced against him, by payment to him of a sum equal to that which he normally would have earned from the date of his discharge to the date of offer of reinstatement, less his net earnings during said period. The backpay provided for herein shall be computed in accordance with the Board's formula set forth in *F. W. Woolworth Company*, 90 NLRB 289, with interest thereon at the rate of 6 percent per annum computed in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the nature and extent of the unfair labor practices engaged in by Respondent, which evince an attitude of opposition to the purposes of the Act in general, I deem it necessary to recommend that Respondent cease and desist from in any other manner infringing upon the rights of employees guaranteed in Section 7 of the Act.

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in the case, I make the following:

## Conclusions of Law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, American Federation of Professional Salesmen, Local 5056, unaffiliated, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Ralph E. Teeter, thereby discriminating in regard to his hire and tenure of employment, in order to discourage membership in and activity on behalf of the Union and the engagement in protected, concerted activity, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

4. By interfering with, restraining and coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

## RECOMMENDED ORDER.

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I recommend that Borek Motor Sales, Inc., Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in and activities on behalf of the Union, or any other labor organization, and

the engagement in protected, concerted activities, by discharging any employee or in any other manner discriminating in regard to hire or tenure of employment, or any term or condition of employment.

(b) Threatening employees with discharge if they engage in protected, concerted activities, or give assistance or support to the Union.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which I find necessary to effectuate the policies of the Act:

(a) Offer to Ralph E. Teeter immediate and full reinstatement to his former or substantially equivalent employment and make him whole for any loss of pay he may have suffered as a result of the discrimination practiced against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Notify Ralph E. Teeter, if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain any backpay due under the terms of this Recommended Order.

(d) Post at its place of business in Chicago, Illinois, copies of the attached notice marked "Appendix."* Copies of said notice, to be furnished by the Regional Director for Region 13, shall, after being duly signed by a representative of Respondent, be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 13, in writing, within 20 days of receipt of this Decision, what steps the Respondent has taken to comply therewith.

Dated at Washington, D.C.

/s/ Max Rosenberg,
Max Rosenberg,
*Trial Examiner.*

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* In the event that this Recommended Order be adopted by the Board, the words "a Decision and Order" shall be substituted for the words "a Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals, Enforcing an Order" shall be substituted for the words "a Decision and Order."

In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

## Appendix (Part 2)

### RESPONDENT'S EXCEPTIONS TO TRIAL EXAMINER'S DECISION AND RECOMMENDED ORDER DIRECTLY RELATED TO THE SECTION 8(a)(3) ISSUE

24. To the finding (p. 8, l. 47-48) that Farino on January 6, 1968 "pressed" Ambriz for the names of Respondent's employees who were expected to be in attendance at a union meeting the next day and asked the time the meeting was scheduled for, because there is no such evidence whatsoever. The finding is wilful embroidery on a single sentence of Ambriz' testimony, which was, "He asked me where the guys were going to meet, to go down, and what time, because he would like to go, maybe" (Tr. 23, l. 13-14). There was no request for names; there was (if Ambriz be believed) a request for the time and place the men would assemble (as they in fact did) to make the trip to the meeting.

25. To the findings, arguments and assumptions (p. 9, l. 15-36) by which the Trial Examiner states he does not credit Farino's undisputed, unimpeached testimony that he was ignorant of the identity of the salesmen who went to a union meeting on January 7, and finds that on January 8 Farino knew that Teeter, Ambriz, Riley, Donohue and Conti had attended such meeting, as being sheer assumption and invention, contrary to the evidence, and wholly unsupported by any evidence. Farino testified early in the hearing that he did not ask Ambriz who was going to attend the meeting (Tr. 13-14). Ambriz, testifying as the General Counsel's witness, did not claim that Farino asked him who was going, but simply where and when "the guys were going to meet to go down [town] and what time" (Tr. 23). The Trial Examiner argues (p. 9, l. 33-34) that "Conti failed to corroborate Farino's testimony that the former [sic] was told only that a meeting had taken place." Presumably the Trial Examiner means

"latter" rather than "former", but in any event this is an impermissible effort to shift the burden of proof to Respondent. No corroboration was required. Farino had testified early in the hearing that on Monday morning, January 8, Conti simply told him the meeting had been held the previous night to organize a union, but didn't tell him who attended or where the meeting was held (Tr. 14-15). Farino assumed that some of his men attended and some didn't (Tr. 121, l. 17-19). If it was the General Counsel's theory that Conti in fact did tell Farino who attended the meeting, it was up to the General Counsel to ask Conti about that matter while he was on the stand. The Trial Examiner has no license to make affirmative findings squarely in the teeth of undisputed evidence.

26. To the finding that Teeter reported for work on January 8, 1968 "at the appointed time * * *" (p. 9, l. 38-39) as unsupported by anything in the record. Unimportant, except as another example of the Trial Examiner's unreliability.

27. To the failure to find that Teeter's sales record was poor and consequently was a prime reason for his discharge (p. 10, l. 11-44; R. Ex. 3), and to the failure to take into account and conclude that Teeter's harmful negative attitude, including his failure to send out promotional literature, his discouraging other salesmen from doing so, and his disagreeing with management over sales prices of autos (Tr. 67, l. 16-19; Tr. 69, l. 11-16; Tr. 105, l. 9-12; Tr. 114-115) were all factors leading to his discharge.

28. To the failure to find in the two paragraphs commencing on page 9, line 48, that Farino's testimony as to Teeter's shortcomings was corroborated by Borek (Tr. 140-142). The Trial Examiner says (p. 9, l. 50), "Farino claimed that he and Borek had discussed Teeter's employment tenure" etc., leaving the erroneous impression that Farino's testimony stands alone. Such is not the fact. The Trial Examiner has revealed his bias by concealing Borek's corroborating testimony and by concealing Teeter's

admission that because of poor sales results he had been placed on a quota before organizing began.

29. To the finding that "not a single complaint was registered by Respondent against Teeter's sales performance" until November 15, 1967, the day of Farino's alleged threat to discharge Teeter (p. 10, l. 52-55), when the record shows without dispute that Teeter was singled out and given a sales quota in late October 1967 for the month of November 1967 as a warning and an incentive to improve his productivity (Tr. 66, l. 6-23; Tr. 119, l. 14-15; Tr. 122, l. 18-21; Tr. 123, l. 2-4). Respondent's dissatisfaction with Teeter was not limited to his sales results alone but to his failure to send out literature, to his urging other salesmen not to obey house policy, to his failure to consult company files, to his arguments over pricing policy, all of which matters were repeatedly brought to his attention (Tr. 114, 115, l. 2-4, l. 20-25).

30. To the failure to find (a) that Teeter came to Respondent as a supposed "professional", i.e., banner salesman, with a self-established goal of selling 25 cars a month (Tr. 64, l. 25; Tr. 65, l. 1), which was slightly under the 25-30 cars a month average of the salesmen for whom replacements were being sought (Tr. 112, l. 3-11); (b) that in the entire three and one-half months ended December 31, 1967, Teeter sold only 21 new cars and five used ones (R. Ex. 3); (c) that although Teeter was given credit for delivery of eight new and two used cars in December, the fact was that the orders for the two used cars which were delivered in December were obtained in December (Tr. 150, l. 19-22), but the orders for only three of the eight new cars which were delivered in December were obtained in that month, and two of those were industrial sales which had been referred to the agency by the First National Bank of Blue Island and thus represented no real sales effort by Teeter (Tr. 144, l. 3-4; Tr. 150, l. 1-15); (d) that Teeter, in December, was slipping rather than improving (Tr. 158-159); (e) that even Teeter, in his rebuttal testimony (Tr. 158-159), in which he claimed

that some December potential sales fell through because of financing or other problems, did not claim he did any business at all in the first week of January 1968.

31. To the finding (p. 10, l. 14-15) that Respondent's sales records belie its defense that Teeter was not a good salesman, because it is contrary to the evidence, which shows that during the period September 18 through December 31, 1967, Teeter delivered a total of 21 new and 5 used cars, whereas Ambriz delivered a total of 54 new and 11 used and Riley, also a new salesman (Tr. 113, l. 10), delivered 47 new and 5 used (R. Ex. 3). Thus, although supposedly a trained, experienced salesman who had sold several makes of cars (Tr. 62-64), Teeter performed at only 50% or less of the productivity of the other trained new car salesmen. This drastic differential is concealed by the Trial Examiner's fragmentation of the figures.

32. To the finding (p. 10, l. 33-36) that Teeter maintained he received the suggestion to send letters to and telephone prospective customers whose names appeared in the Company's files as former customers on only two occasions, once before Christmas 1967 and in his terminal interview, as unsupported by any evidence and flatly contrary to all the evidence on the subject.

In the one full paragraph on page 10 of the Trial Examiner's Decision, the facts of the record are hopelessly snarled. Farino testified emphatically and, as we shall show, plausibly, that he asked Teeter "time and time again" to make phone calls and send out cards (Tr. 114), "* * * every chance I got, I kept telling Ralph, make phone calls, write letters, go to the safe and get in the files" (Tr. 115) as other salesmen were doing (Tr. 105, l. 14-16). Teeter never denied or contradicted this evidence.

The Trial Examiner's statement that Teeter maintained he received "this suggestion" on "but two occasions" (p. 10, l. 34) is wholly inaccurate because the "two occasion" evidence refers to a separate criticism by Farino, namely, that Teeter spent too much time reading a trade journal, "The Automotive News".

The way this matter arose was that counsel for Respondent, in technical error, in his last question in the cross-examination of Teeter, asked a double question pertaining both to criticism by Farino of Teeter for spending time reading the Automotive News and criticism for not getting on the telephone and following up leads and sending out mailings. The record is as follows (Tr. 69-71):

> "Q. (By Mr. Christensen) Mr. Witness, isn't it a fact that Mr. Farino, during the fall months, criticized you for spending too much time for reading an automotive news and for not getting on the telephone and calling up leads and sending out mailings on leads?
>
> "A. Farino had mentioned this on two occasions.
>
> * * *
>
> *Redirect Examination*
>
> "Q. (By Mr. Crawford) Mr. Teeter, referring to this question about Automotive News, what is the Automotive News?
>
> "A. This is the trade paper that's known as the bible of the industry. [Then follow descriptions of Automotive News and Teeter's reading habits.]
>
> "Q. What did Mr. Farino say to you, Mr. Teeter, if anything at all?
>
> "A. The first time he said, 'You got your nose in that bible again. What does it say?'
>
> "It says, 'It looks like they are going to take the sale of insurance away from the car dealers. They have a Bill before the Congress to that effect.'
>
> "He made a comment, and that was all.
>
> "The next was on the evening he fired me.
>
> "Q. The evening he fired you?
>
> "A. He said, 'You are always reading that Automotive News.'"

This makes it clear that despite the double nature of the final question of the cross-examination, Teeter's evidence and assertion that he was criticized on only "two occasions" pertains solely to the Automotive News criticism. It also is clear that while Teeter fixed the second episode

as occurring on the evening he was discharged, he did not fix the date of the first episode at all. Thus, the Trial Examiner is wholly wrong as to subject matter and only half right as to time.

Although Teeter went on the stand in rebuttal (Tr. 157-165) after Farino had testified, he did not endeavor to contradict or deny Farino's testimony that Farino had been after him constantly about mailings and telephone calls. Teeter tried to meet the evidence on that subject in two inconsistent ways: (1) by the incredible assertion, which we will deal with elsewhere, that in fact he did make some mailings but at his, rather than the agency's, expense. This unbelievable answer of course tacitly admits that, under Company policy, he should have made mailings. (2) Inconsistently, he asserted that the period before Christmas was not a good time for mailings. This assertion of course tacitly admits that he wasn't making mailings and was offering an excuse for not doing so.

The paragraph on page 10 of the Decision cannot stand in the light of the following facts:

(a) A series of deaths required a rebuilding of Borek's sales force (Tr. 110-112), and, moreover, when Farino was made Sales Manager in place of Verdett, who had died (Tr. 110, l. 20), a crack salesman, White, who thought he should have been promoted, quit (Tr. 135, l. 7-8). These things happened in the late spring and summer of 1967 and resulted in a drastic decline in business in the last half of 1967. In the last six months of 1966 the agency delivered 475 new cars, but in the same period of 1967 it delivered only 292 (R. Ex. 4), or, stated another way, in a period of general prosperity it suffered a 39% decrease in sales. Respondent's anxiety that there be a full sales effort by all of its salesmen is understandable in the light of these unfortunate facts but they were ignored by the Trial Examiner. Farino faced this difficult situation when he became Manager on October 1, 1967 (Tr. 64, l. 21-2).

(b) October and November usually are good months in the automobile business because the new models are then

available. Thus, in 1966 Borek's sales jumped from 54 in September to 91 in October and 116 in November (R. Ex. 4), but in 1967, September sales had been 46 and increased only to 54 and 59 in October and November (R. Ex. 4). Hence, Farino's concern that every salesman exert every effort possible has ample explanation. Contrary to the direct statements or implications of the Trial Examiner's Decision that no one was criticizing Teeter's sales efforts, Farino says he was after him "time and time again" (Tr. 114). Teeter admitted that late in October or on one of the first days of November, Farino singled him out and set a quota of 15 cars for him for the month of November (Tr. 67, l. 6-23; Tr. 61, l. 2-4), and he did the same for December (Tr. 122). Meantime, by Teeter's admission, he was having differences of opinion with Farino as to the amount of profit the house should get on deals he was trying to close, Teeter believing the house should get a higher profit than Farino was willing to settle for (Tr. 67, l. 16-25).

(c) Borek, the President, testified that in November he began discussing Teeter's unsatisfactory performance with Farino—"* * * how come a man like Teeter is not rolling high? He had been here just enough time, he should really be in high gear, with his past experience in that, we needed a man real bad. And we looked so much to him for his top performance and it wasn't coming" (Tr. 140, l. 15-20).

(d) Farino testified, as heretofore noted, that "time and time again" he beseeched Teeter to make phone calls and to mail out cards and letters. It was Farino's theory and statement to Teeter that the best place for the latter to start was in the Company's safe with records of old customers who formerly had been sold by salesmen no longer with the agency to get leads to possible further sales and for mailings and telephone calls (Tr. 114, l. 10-19). Farino testified (Tr. 114, l. 20) that despite this advice, Teeter never once went to the files (and Teeter does not dispute this), and that Teeter never once came to him with a letter to be printed (Tr. 114, l. 20-21) (Teeter

does not dispute this either). A sample of the kind of letters Farino was talking about appears as R. Ex. 2.

(e) Borek circumstantially corroborates Farino's testimony that he could not get Teeter to follow suggested procedures. Borek said, in testimony which, as written, is somewhat ungrammatical but nevertheless clear in purport: "I discussed with Mr. Farino his repeated remarks, work continually with Mr. Teeter's attitude, just not there. He wouldn't send any cards. I can't suggest anything, I can't tell him anything. It's a matter of attitude more than anything else that made my decision that Mr. Teeter probably did not belong in 'our organization" (Tr. 140, l. 21-25).*

(f) In rebuttal testimony Teeter claimed that every time he sold a car he sent cards to neighbors on each side of the street in the block the customer lived on, asking whether they had seen what their neighbor had done and requesting them to see him for a good deal (Tr. 157, l. 12-24); that the only mailings he made beyond that were 25 cards to owners of 1964 automobiles (Tr. 162, l. 6-8). However, the giveaway in this testimony and confirmation of Farino's complaint of Teeter's failure to make mailings and telephone calls was Teeter's own differentiation between what he was doing and what salesman Conti, who was sending many letters to previous owners, was doing. Teeter admits he asked Conti whether he was getting any results from his mailings, that he had sent out 25 letters and got nothing. He asserts that Conti said he hadn't gotten any results either (Tr. 160, l. 1-16). Teeter's own testimony, taken at best for Teeter, confirmed that Teeter was

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* We would translate the foregoing quotation as follows: "I discussed with Mr. Farino his repeated remarks about working continually with Mr. Teeter's attitude, which just was not there. Farino said 'He wouldn't send any cards. I can't suggest anything, I can't tell him anything.' It was the matter of Teeter's attitude more than anything else that led to my decision that Mr. Teeter probably did not belong in our organization."

not doing what Conti was doing. Farino was emphatic in his testimony that Conti was sending out cards and making telephone calls (Tr. 115, l. 4-7; Tr. 116, l. 4-25); that he knew who was doing so and who wasn't because "I have to order all these letters and cards" (Tr. 116, l. 18); that he chose Teeter for discharge rather than Conti "because Mr. Conti was working. Mr. Conti was trying. Mr. Conti was following orders. Mr. Teeter was doing none of these" (Tr. 125, l. 12-15).

(g) The Trial Examiner finds (p. 40, l. 41-43) that Teeter testified that he made mailings and paid for them out of his own pocket. It is the recollection of the undersigned that this was his testimony. However, as the record has been written (See question at bottom of Tr. 161 and answer at 162), the transcript is not clear. However, we accept the Trial Examiner's statement that Teeter claimed he made mailings and paid the postage himself. This appears to have been the theory of counsel for the General Counsel, as is demonstrated by the following passage (Tr. 125-126):

> "Q. You know for certain that Mr. Teeter was not sending out cards to customers?
>
> "A. [By Farino] Absolutely.
>
> "Q. You know he was not doing any at home?
>
> "A. No.
>
> "Q. He could have been doing it at home, is that correct?
>
> "A. At his own expense[?]
>
> "Q. You really don't know, he could have been doing it at home?
>
> "A. I would think the proper procedure would have been for Mr. Teeter to bring materials he was sending out at home to let me see, because I must okay everything that goes out."

We suggest that it is incredible that a man who was complaining he wasn't making enough money would assume an advertising cost that the Company was cheerfully assuming

for every other salesman (Tr. 104, l. 11-25; Tr. 105, l. 1-5).

(h) The Trial Examiner (p. 10, l. 26) derides as a "curious comment" Farino's testimony that when he discharged Teeter, he said (Tr. 119, l. 15-18):

> "I have given you an objective for November and December which you did not meet. This is not the objection so much, it is, you are not making any efforts with the phone or the letters or personal mail, or any contact whatsoever."

This comment was by no means "curious" if one considers the undisputed facts of the record just reviewed and to which the Trial Examiner paid little, if any, attention. In a nutshell, the business was in bad condition, sales were way down. Farino had shouldered a new and difficult responsibility and had hired a new salesman, Teeter, whom he believed might be the answer to part of his problem. The salesman had set a goal for himself of 25 cars a month, but even in the lush season of the year came nowhere near meeting it. He had differences with the Sales Manager over pricing policies, he refused to dig into the Company's files for leads as to possible sales and advised another salesman not to send out cards (Tr. 105, l. 6-12). Even if we make what to us is the impossible assumption that he was telling the truth when he said he made mailings from home at his own expense, he was still violating Company policy because all advertising material is supposed to be submitted to the Manager. In short, as Farino put it at another place in his testimony, Teeter was discharged "for not working" (Tr. 128, l. 1). Rather than being "curious", the clear sense of Farino's testimony was that if Teeter had followed the sales practices which had been suggested to him, and had had the same sales results, the objection to his failure to make his quota would not have been so great. So far as the Labor Act is concerned, it is immaterial whether Farino's theory as to how an automobile salesman should get business was correct or incorrect. That is a matter for business, rather than

Board, decision. What is important, and what the Trial Examiner wholly overlooked, is that the thing that distinguished Teeter from the other salesmen was not that he had signed an application card for the Union, for apparently all of the salesmen had, and according to the Trial Examiner Farino knew this or "had a good idea" of it (p. 9, l. 26). Indeed, Teeter appears to have been only moderately interested in the Union: it was Ambriz who received and passed out the literature in the first place (Tr. 17, l. 6-23), Ambriz who collected the first batch of signed cards and placed them in the mail (Tr. 20, l. 16-20), Ambriz who arranged to drive the others to the January meeting (Tr. 59, l. 3-7). All the others signed cards the first day they were presented but Teeter delayed for two days (Tr. 65, l. 4-25). The thing that set Teeter apart from all of the other salesmen was his failure to follow the sales procedures that were house policy.

33. To the assertion (p. 10, l. 45) that the findings were made "after a careful review of all the evidence," whereas the findings in repeated instances are either without any evidentiary support or are squarely contrary to undisputed evidence.

34. To the finding (p. 10, l. 52-55) that "not a single complaint was registered by Respondent against Teeter's sales performance until Farino observed him reading union literature in the showroom on November 15, 1967," for the reasons set forth in Exception 32, paragraph (b).

35. To the finding (p. 11, l. 2-7) that Teeter's discharge in January 1968 was because he had attended a union meeting on the preceding evening, as unsupported by any evidence.

36. To "The Remedy" because (a) the evidence shows no unfair labor practices were committed, and (b) because the Trial Examiner's argument or finding (p. 11, l. 43-47) that because "of the nature and extent of the unfair labor practices engaged in by Respondent" etc., sweeping relief

is called for, is the culminating demonstration of the unfairness which permeates the entire Decision. This recommendation is the capstone of the Decision and is a further demonstration of how deeply the Trial Examiner's misconstruction of Borek's remarks to his sales force tainted all of his thinking.

If one sticks to the record it will be found that the only evidence of hostility to the Union (or to the Act) is in the disputed evidence as to whether Farino threatened Teeter on November 15, 1967. And however one may view that evidence, and whatever it may be believed to show as to Farino, it cannot rationally be said to "evince an attitude of opposition to the purposes of the Act in general" (TXD, p. 11, l. 44-45) by Respondent which stated its attitude through its President, Ted Borek.

The fact that Respondent dismissed Teeter on January 8, 1968, after he had failed to follow Respondent's sales promotion policies, and in three months and three weeks of employment had been able to sell only 21 new and five used cars, whereas he had set a pace of 25 cars a month for himself (which would mean 91 cars in three months and three weeks) and had been hired as a professional replacement for men who averaged 25 to 30 cars a month, cannot be said to "evince" hostility to the purposes of the Act." The Trial Examiner's conclusion that Teeter was not fired for understandable business reasons is obnoxious to common sense. But even if the issue as to Teeter's discharge was debatable, there still would be nothing in the record to show that the Respondent has an attitude of opposition to the purposes of the Act. The General Counsel's own witnesses, testifying as to what Borek told his salesmen, gave evidence which precludes such a conclusion. The Trial Examiner's willingness to throw the book at Respondent, however, demonstrates that none of his inferences or conclusions are credible.

37. To the Conclusions of Law 2 to 5 inclusive because they are contrary to the evidence and to the law.

38. To the Recommended Order because it is contrary to the evidence and to the law.

Respectfully submitted,
/s/ George B. Christensen,
George B. Christensen,
/s/ Richard F. Vitkus,
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Respondent's Motion to Set Aside Trial Examiner's Decision, and Exhibits 1 and 2 thereto were attached to Respondent's Exceptions to Trial Examiner's Decision as Exhibit 1, Exhibit 1 to Exhibit 1 and Exhibit 2 to Exhibit 1.

## Appendix (Part 3)

### DECISION OF THE NATIONAL LABOR RELATIONS BOARD

On July 25, 1968, Trial Examiner Max Rosenberg issued his Decision in the above-entitled case, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief,[2] and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.

Respondent excepts to the Trial Examiner's finding that the Charging Party qualifies as a labor organization under Section 2(5). Respondent does not seriously dispute the fact that the Charging Party is, as the record in-

[2] Respondent initially filed a Motion to Set Aside the Trial Examiner's Decision, to which the General Counsel filed a statement in opposition. Respondent withdrew the Motion at the time it filed exceptions. 173 NLRB No. 155.

dicates, an organization in which employees—automobile salesmen—participate and which exists for the purpose of dealing with their employers—automobile dealers—concerning their terms and conditions of employment. Rather, Respondent argues that the Board has an obligation to deny the use of its processes to the Charging Party and, inferentially, to withhold the protection of the Act from employees acting in its behalf, because the Charging Party allegedly intends to achieve its "normal labor objectives" by conspiring with employers, in violation of the Sherman Act, to fix car prices. We find no merit in Respondent's argument in the instant case. Assuming arguendo, as Respondent maintains, that the Charging Party's proposed bargaining platform is a blueprint for an unlawful price-fixing conspiracy, any employer confronted with such a bargaining proposal would be free to reject it and could not be compelled to do otherwise. Moreover, so far as the record shows, the Charging Party has not predicated its existence on its ability to obtain these allegedly unlawful price-fixing agreements from employers; it has merely indicated that it considers such agreements to be a means, albeit a preferred one, of securing employee benefits. In view of these circumstances, we can perceive no statutory justification for refusing to accord the Charging Party recognition as a labor organization under Section 2(5), and we therefore affirm the Trial Examiner's finding in this respect.

The Trial Examiner found, inter alia, that Respondent's Manager Farino, on November 15, 1967, threatened Ralph Teeter with discharge if he signed a union card, thus violating Section 8(a)(1). In crediting the testimony of employees Ambriz, Teeter, and Riley that Farino made such a remark, against contradictory testimony by Farino and employee Conti, the Trial Examiner relied, to some degree, on the testimony of Respondent's President Borek concerning his November 21, 1967, speech to employees. The Respondent contends, and we agree, that the Trial Examiner misconstrued Borek's testimony in his findings

that Borek threatened to move the business unless the Union organized all car agencies in the state and also indicated that he viewed the Union's organizing effort as a "problem" he "didn't like." However, we find, after carefully reviewing the Trial Examiner's Decision, that his reference to the Borek speech played only a minor role in his credibility determination of this matter. The substantial bases for his determination were his finding that Ambriz, Teeter, and Riley were "forthright and honest witnesses" together with his conclusions with regard to other circumstances reflecting adversely on Farino's credibility. Accordingly, notwithstanding our disavowal of the Trial Examiner's interpretation of Borek's testimony, we affirm the Trial Examiner's finding of a violation of Section 8(a)(1) of the Act.

## ORDER.

Pursuant to Section 10(c) of the National Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, Borek Motor Sales, Inc., Blue Island, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Dec. 3, 1968.

Frank W. McCulloch,
*Chairman,*
Gerald A. Brown,
*Member,*
Howard Jenkins, Jr.,
*Member,*
*National Labor Relations Board.*

(Seal)

A copy of the Trial Examiner's Decision was attached to the Board's Decision and Order.

## Appendix (Part 4)

### OPINIONS OF THE COURT OF APPEALS

Before HASTINGS, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges*.

CUMMINGS, *Circuit Judge*. This petition asks us to set aside an order of the National Labor Relations Board requiring petitioner to cease and desist from threatening employees with discharge for giving assistance to the Union[1] and to reinstate a discharged employee.

Petitioner is a Pontiac automobile dealer in Blue Island, Illinois. In pertinent part, the evidence on which the trial examiner based his findings shows that on November 15, 1967, a salesman from another Pontiac agency gave Ralph Ambriz, one of petitioner's salesmen and its assistant sales manager, six to eight envelopes containing literature and authorization cards of the Union. Ambriz distributed three of these envelopes to fellow salesmen Howard Riley, Al Donohue, and Ralph Teeter. When petitioner's general manager, Robert Farino, asked about the material which the salesmen were examining, Ambriz explained that it was union literature with authorization cards. Before Ambriz had read the material, Farino approached him and took the material. He next reached for the material in Teeter's possession. When Teeter responded that he had not finished reading it, Farino remarked to him: "If you are going to sign, don't bother then, because I'll fire you first." Although Farino denied this and another salesman testified that he had not heard such a threat, the trial examiner credited the testimony

[1] American Federation of Professional Salesmen Organizing Committee, Local 5056, Communications Workers of America, AFL-CIO. Since January 31, 1968, the Union has been known as American Federation of Professional Salesmen, Local 5056, Unaffiliated.

of Ambriz, Riley and Teeter, all of which attested to the threat.

Forty-five minutes later, Ambriz retrieved two of the envelopes and their enclosures from the wastebasket in Farino's office. About November 17, Ambriz received signed authorization cards from Riley, Donohue, and possibly salesman Sam Conti.[2] Ambriz placed the cards with his own in an envelope which he dropped into petitioner's mailbox for posting to the Union; but Teeter mailed his card directly to the Union. The Union received only Teeter's authorization card. Consequently, in early December, the other salesmen executed new authorization cards which Teeter then mailed to the Union.

Petitioner's president, Ted Borek, learned of the Union's organization effort on November 15, when Farino called it to his attention. Borek referred to it as follows:

> "All of a sudden * * *, a situation of this kind comes up and they don't confide in you. All of a sudden the air is pretty thick. I don't know why it should be. I didn't like it."

At a November 21 breakfast meeting with his salesmen, Borek told them that union organization was their privilege. He also advised them that if there were a union, the entire state should be organized or customers would go to other Illinois towns to obtain cheaper automobiles. He said "he wouldn't want to be a victim of the one individual [on the opposing team], which would be joined in the union," and that union membership "was not a fancy [cure] for the ills of the world."

On January 6, 1968, according to the credited testimony, Farino asked Ambriz for some information about a meeting of the Union to be held on January 7. Because of an

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[2] We accept the Board's repudiation of the examiner's interpretation that unless the unionization was statewide, Borek was threatening to move his dealership from Blue Island.

interruption. Ambriz did not respond, but he "knew" that Farino would have been against the meeting. On the same day, Ambriz volunteered to drive petitioner's other four salesmen to the meeting. All five of them were in attendance on the following evening.

Teeter considered that from time to time salesman Conti passed information along to Farino. On January 8, Farino learned from Conti that the scheduled meeting to organize the Union had taken place. Farino "assumed" that some of his salesmen were present, but he did "not for sure" know whether Teeter had attended. On the evening of January 8, Teeter was discharged by Farino. Farino asserted that the discharge was prompted by Teeter's poor sales record, including his refusal to send letters to and telephone prospective customers. Teeter protested his discharge, telling Farino that he was "only three cars behind the top man." Although ill from about Christmas 1967 until early January, Teeter was actually only two delivered cars behind Ambriz in December.

Apart from disagreeing with his interpretation of Boreks November 21 breakfast talk, the Board adopted the examiner's findings and held that petitioner violated Section 8(a)(4) of the National Labor Relations Act (29 U.S.C. § 158(a)(1)) by threatening Teeter with discharge if he signed a union card, and that it violated Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) by discharging him for joining and supporting the Union. We conclude that the Board's order must be enforced.

*The Cease and Desist Order*

There was substantial evidence from which the Board could conclude that the petitioner violated Section 8(a)(1) of the Act by virtue of the coercive threat of its sales manager Farino. Three witnesses testified to the threatened discharge of Teeter should he sign the Union's authorization card. In spite of this clear infringement of the employees' Section 7 organizational rights by their supervisor, Borek now claims that the Board should

not have issued the cease and desist order. Petitioner asserts that the violation was isolated and was, in any event, "cured" by the remarks of the Company's president on November 21. We disagree.

There is no need to engage in a prolonged discussion of the issuance of cease and desist orders predicated upon isolated instances of insignificant or technical violations of the National Labor Relations Act.[1] Here a review of the findings of the Board evinces that the violation was neither isolated nor insignificant. The threat of discharge is one of the most effective coercive weapons available to management. *National Labor Relations Board v. Louisville Chair Company*, 385 F.2d 922, 926 (6th Cir. 1967), certiorari denied, 390 U.S. 1013. Moreover, after warning Teeter, Farino virtually confiscated the union literature and authorization cards and discarded them in his wastebasket whence the employees were forced to retrieve them. There is even evidence suggesting that signed authorization cards placed in the Company's mailbox were removed and prevented from reaching the

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[1] Petitioner is not well supported by the Board's occasional refusal to issue a cease and desist orders in such situations. See, *e.g.*, *West Texas Utilities Co.*, 85 NLRB 1396 (1949), enforced, 184 F.2d 233 (D.C. Cir. 1950), certiorari denied, 341 U.S. 939; *Atlas Storage Division, P & V Atlas Industrial Center, Inc.*, 112 NLRB 1175 (1955), enforced, 233 F.2d 233 (7th Cir. 1956). The role of courts in determining the propriety of particular orders is radically different from the wide discretion which Congress has bestowed upon the agency. Cf. *L. & H. Trucking, Inc.*, 155 NLRB 104, 104-105, 116 (1965); see also *Jaycox Sanitary Service of Garden Grove, Inc.*, 161 NLRB 544, 545 (1966). Moreover, under the proper circumstances, the Board has determined that even an isolated interference with Section 7 rights requires such an order. *E.g.*, *Lever Brothers Company*, 163 NLRB 194 (1967).

Union. Some months after these events, Farino quizzed Ambriz concerning a union meeting to be held that night. On the following day, Farino learned from Conti of the meeting and, that same day, discharged Teeter who had attended the meeting. The Board was certainly justified in construing these events as indicating a continued expression of hostility to the Union which intimidated Borek's employees.

Nor do we accept petitioner's contention that president Borek's November 21 breakfast remarks vitiated the unwholesome effects of Farino's actions. These remarks were not the "specific, and unambiguous assurances to employees" present in *Playwood Plastics Co., Inc.*, 110 NLRB 306, 313 (1954). Viewed in the context of the overall behavior of petitioner, his remarks fail to undercut the Board's conclusions or the propriety of its cease and desist order. See *Time-O-Matic, Inc. v. National Labor Relations Board*, 264 F.2d 96, 99-100 (7th Cir. 1959); *National Labor Relations Board* v. *Marsh Supermarkets, Inc.*, 327 F.2d 109, 112 (7th Cir. 1963), certiorari denied, 377 U.S. 944.

*The Discriminatory Discharge*

Petitioner next argues that its discharge of Teeter did not violate Section 8(a)(3) prohibiting the discriminatory discharge of an employee to discourage membership in a labor organization. Borek contends that the dismissal was the result, not of any anti-union animus on its part, but of the poor performance of Teeter as a salesman.

It is well settled that the presence of valid grounds for an employee's discharge does not legalize a dismissal which was nevertheless due to a desire to discourage union activity. *National Labor Relations Board* v. *Symons Manufacturing Co.*, 328 F.2d 835, 837 (7th Cir. 1964); *Nachman Corp.* v. *National Labor Relations Board*, 337 F.2d 421, 423-424 (7th Cir. 1964); see also *National Labor Relations Board* v. *Stafford Trucking, Inc.*, 371 F.2d 244,

247 (7th Cir. 1966). In this case, assuming *arguendo* that Teeter's sales performance would have justified dismissal, there was substantial evidence from which the Board reasonably inferred that the discharge was not based solely upon that ground and was therefore illegal.

In addition to Farino's threat to fire Teeter which was made in the presence of other employees, there was evidence from which the Board could have inferred that the Company, through Farino, was aware of his continued activity with the Union. The timing of the discharge also supports the inference that Teeter was fired in order to make good the threat and support its intimidating effect on his fellow employees. Cf. *National Labor Relations Board* v. *American Casting Service, Inc.*, 365 F.2d 168, 171-172 (7th Cir. 1966); *National Labor Relations Board* v. *Camco, Incorporated*, 340 F.2d 803, 811 (5th Cir. 1965), certiorari denied, 382 U.S. 926; *National Labor Relations Board* v. *Ambox, Incorporated*, 357 F.2d 138, 142 (5th Cir. 1966). Unlike *Broadway Motors Ford, Inc.* v. *National Labor Relations Board*, 395 F.2d 337 (8th Cir. 1968), relied upon by petitioner, here were not only a coercive threat and other indicia of anti-union bias, but also less than convincing evidence that Teeter was an employee whose job performance had long marked him for discharge. See *National Labor Relations Board* v. *Harry F. Berggren & Sons, Inc.*, 406 F.2d 239, 246, note 10 (8th Cir. 1969), certiorari denied, 396 U.S. 823. Considering the totality of the evidence, the Board's determination that Teeter's discharge violated Section 8(a)(3) of the Act was supported by substantial evidence and the reinstatement remedy was appropriate.

*Compliance with the Administrative Procedure Act*

It is next urged that the Board failed to comply with the requirements of Section 557 (c) of the Administrative Procedure Act[4] by failing to state its reasons for overruling each exception pertaining to the discriminatory discharge issue.

The purposes of the procedural requirements outlined in Section 557 (c) are to preserve objections in the record and to inform the parties and any reviewing body of the disposition of the case and the grounds upon which the agency's "decision" is based. By its terms, the statute only requires the Board to rule on each exception, not to state the reasons therefor. In its decision here, the Board stated that it had considered the exceptions of the Company and nevertheless adopted the examiner's findings, conclusions and recommendations (except with respect to his interpretation of president Borek's November 21 statements). By adopting the trial examiner's opinion in this fashion, the Board adequately presented the findings, conclusions, and reasons therefor which the Administrative Procedure Act requires. The Board indicated that it passed upon each exception presented by the Company. Some exceptions were discussed in the decision; the others obviously were overruled, for the Board adopted "the findings, conclusions, and recommendations of the Trial Examiner, as modified herein."

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[4] That Section provides in pertinent part (5 U.S.C. § 557(c)):

> "The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> "(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record."

More than that is not demanded by the statute and would place a severe burden upon the agency for which no justification has been presented. The substance of petitioner's contention has been considered and consistently rejected, with respect to the National Labor Relations Board as well as other agencies of the Government. *National Labor Relations Board* v. *Process Corporation*, 412 F.2d 215, 217 (7th Cir. 1969); *American President Lines, Ltd.* v. *National Labor Relations Board*, 340 F.2d 490, 492 (9th Cir. 1965); *Division 1142* v. *National Labor Relations Board*, 294 F.2d 264, 268 (D.C. Cir. 1961); *National Labor Relations Board* v. *Wichita Television Corporation*, 277 F.2d 579, 585 (10th Cir. 1960), certiorari denied, 364 U.S. 871; *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F.2d 645, 652-653 (6th Cir. 1954); *National Labor Relations Board* v. *State Center Warehouse & Cold Storage Co.*, 193 F.2d 156, 158 (9th Cir. 1951); see also *Minneapolis & St. Louis Ry.* v. *United States*, 361 U.S. 173, 193-194.

*The Alleged Antitrust Violation*

Although petitioner no longer seriously challenges that the Union is a labor organization within the meaning of Section 2(5) of the Act (29 U.S.C. § 152(5)), it does contend that an alleged price-fixing proposal of the Union contemplates a violation of the Sherman Act and therefore should cause the Board to withhold its processes from the Union as the charging party and deny the protection of the National Labor Relations Act to the employees joining it.

Petitioner cannot use the asserted antitrust violation as a shield to justify its own improper actions in resistance to unionization. Petitioner could have countered illegal union propaganda without employing the coercive threat and unfair discharge which this record reveals. If the Union should ultimately win representational rights at the Borek concern, petitioner could not then be compelled to violate the antitrust laws by accepting an illegal provision in its contract. *Schmerler Ford, Inc.* v. *National*

*Labor Relations Board*, ..... F.2d ..... (7th Cir. 1970). The appropriate time to consider the legality of the Union's plan will be if the Union places it before petitioner as a matter for compulsory bargaining. Cf. *Retail Clerks International Association* v. *National Labor Relations Board*, 366 F.2d 642, 648 (D.C. Cir. 1966), certiorari denied, 386 U.S. 1017. Under these circumstances the Board was not presently required to decide whether the proposal violated the Sherman Act. Cf. *Leedom* v. *International Union*, 352 U.S. 145.

The petition for review is denied; the cross-petition for enforcement is granted.

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FAIRCHILD, *Circuit Judge*, concurring. I agree in all respects except that my views with respect to the alleged price-fixing proposal and the Board's duty to recognize its illegality are set forth in my concurring opinion in *Schmeiler Ford, Inc.* v. *National Labor Relations Board*, ..... F.2d ..... (7th Cir. 1970).

---

HASTINGS, *Senior Circuit Judge*, dissenting.

On this review we are first asked to consider whether there is substantial evidence on the record considered as a whole to support the Labor Board's finding and holding that the employer, Borek Motor Sales, Inc.,[1] violated Section 8(a)(1) of the National Labor Relations Act[2] by threatening its automobile salesman, Ralph E. Teeter, with discharge if he signed a union card, and that Borek violated Section 8(a)(3) of the Act[3] by discharging Teeter for joining and supporting the union.

With deference to the majority, as I read and understand the record before us, I do not find substantial

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[1] Ted A. Borek was president of Borek Motor Sales, Inc., and reference is made herein to each as Borek.

[2] 29 U.S.C.A. § 158(a)(1).

[3] 29 U.S.C.A. § 158(a)(3).

evidence to support the Board's challenged findings and would deny enforcement of its resulting order.

In the first half of 1967, Borek's sales organization was critically depleted. Faren, a new car salesman, died first. Bonn, the used car manager, died next. Verdett, the general sales manager, was the third one to die. Farino, another salesman of 14 years' experience, was promoted to general sales manager following Verdett's death. White, another long time experienced salesman, quit his job because he was not promoted to general sales manager instead of Farino. About seven salesmen were a normal complement.

Borek and his manager, Farino, became quite concerned and made a desperate effort to recruit experienced salesmen. Teeter came to their attention through Donohue, another salesman. Teeter was an experienced salesman with a good record. Borek employed him. He started to work on September 18, 1967. His sales performance did not meet Borek's expectations and Borek began insisting to Farino, during November and December, that Teeter be discharged. However, Farino wanted to give Teeter further opportunity to make good. Finally, Teeter became ill and was hospitalized in late December. Farino persuaded Borek to defer the discharge until Teeter had another week to try again after his return. Finally, Farino called Teeter into a private conference on the evening of January 8, 1968. After reviewing in detail Teeter's unsatisfactory work and sales performance, Farino discharged him. No reference was made at that time to any labor organization. Borek was not present during this final interview but as early as the middle of November, 1967 had been suggesting that this step should be taken. It was Borek, not Farino, who had insisted upon the discharge.

The Board overruled the Examiner and found that Mr. Borek had no anti-union animus. I cannot believe that Farino's isolated statement made on the first day of the union organizational campaign, and the attendant

impulsive incidents, before any salesman had signed a union card, is entitled to the controlling effect accorded to it by the Board. A week later, Borek in effect purged this alleged statement of any adverse effect in his breakfast meeting with the salesmen. Later all salesmen signed union cards. No one else was discharged. Apparently there were only five salesmen in the entire group.

I have carefully reviewed the entire record pertaining to the Teeter discharge. I am compelled to conclude that the discharge was for valid, well supported economic reasons.[1]

I have further concluded, on considering the record as a whole, that the Board's findings that the employer Borek threatened Teeter with discharge and later discharged him for protected union activities in violation of Sections 8(a)(1) and 8(a)(3) of the Labor Act, are not supported by substantial evidence. On this basis, I would deny enforcement of the Board's order.

I do not reach the alleged antitrust violation in this case. I have separately stated my views thereon in my dissent to the companion case of No. 17659, *Schmerler Ford, Inc., et al.* v. *National Labor Relations Board*, ..... F. 2d ..... (1970), consolidated for hearing with the instant case.

A true Copy:

Teste:

.....

*Clerk of the United States Court of Appeals for the Seventh Circuit.*

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[1] The majority opinion notes Teeter's testimony, together with a December, 1967 statistic, indicating Teeter's favorable sales record. A countervailing summary could be shown from the record. In any event, the employer was not satisfied and exercised a legitimate prerogative of management.

## Appendix (Part 5)

### JUDGMENT OF THE COURT OF APPEALS
(Caption Omitted)

Before: HASTINGS, *Senior Circuit Judge*, FAIRCHILD and CUMMINGS, *Circuit Judges*.

This Cause came on to be heard upon the petition of Borek Motor Sales, Inc., to review an order of the National Labor Relations Board issued against it on December 3, 1968, and upon cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on January 13, 1970, and has considered the briefs and transcript of record filed in this cause. On April 8, 1970, the Court being fully advised in the premises, handed down its decision denying the petition for review and granting enforcement of the Board's order.

On Consideration Whereof, it is ordered and adjudged by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Borek Motor Sales, Inc., its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

/s/ Thomas E. Fairchild
Judge, United States Court of Appeals for the Seventh Circuit

/s/ Walter J. Cummings
Judge, United States Court of Appeals for the Seventh Circuit

## Appendix (Part 6)

### STATUTES AND RULES INVOLVED

National Labor Relations Act, Sections 7, 8(a)(1) and (3), and 10(c) and (e) (61 Stat. 136, 29 U.S.C. § 151 *et seq.*)

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

* * *

Sec. 10 * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate

the policies of this Act. * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

* * *

(e) * * * No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * *

Administrative Procedure Act, Section 557
(5 U. S. C. A. § 557).

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without

having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decision; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

N. L. R. B. Rules and Regulations, Series 8, Sections 102.46(b)(c) and (h) and 102.48(c) (29 C. F. R. §§ 102.46(b)(c) and (h), and 102.48(c)).

Sec. 102.46 *Exceptions, cross-exceptions, briefs, answering briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*— * * *.

(b) Each exception (1) shall set forth specifically the questions of procedure, fact, law, or policy to which exceptions are taken; (2) shall identify that part of the trial examiner's decision to which objection is made; (3) shall designate by precise citation of page the portions of the record relied on; and (4) shall state the grounds for the exceptions and shall include the citation of authorities unless set forth in a supporting brief. Any exception to a ruling finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

(1) A concise statement of the case ~~containing~~ all that is material to the consideration of the questions presented.

(2) A specification of the questions involved and to be argued.

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

(h) No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding.

* * *

Sec. 102.48 *Action of Board upon expiration of time to file exceptions to trial examiner's decision; decisions by the Board; extraordinary postdecisional motions.*— * * *

(c) Where exception is taken to a factual finding of the trial examiner, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

* * *

## SHERMAN ACT, SECTION 1
## (26 Stat. 209, 15 U.S.C. §1)

Sec. 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

## Appendix (Part 7)

### EXCERPTS FROM TESTIMONY OF HOWARD RILEY

107 Q. What did he [Borek] say on the subject of unionization?

A. Mr. Borek didn't knock the union. I don't remember what [44] he said. There wasn't too much said. I think the big thing that Mr. Borek was implying at the meeting was, business was bad and we had to pick up business and do a little better job than we had been doing. And I have never heard Mr. Borek elaborate on the good or the bad of the union. He has never got into that field too much.

I think he did say that he wouldn't want to be a victim of the one individual, which would be joined in the union, in a round about way. And that's about the basis of it.

Q. Could I expand on it.

Didn't he say, in substance, that if enough dealerships were organized it might be a good thing, if there were just a few, at higher cost, they would have a rough time making a go of it?

A. Well, to be honest, I can't recollect that point. I wouldn't want to comment on it, sir.

Q. Well, you used the phrase, "He wouldn't want to be the victim—"

A. Well, that would be some thing that would stand out in my own mind as an individual on the opposing team. This is a team, you know.

Q. He didn't say he was opposed to you or the union?

A. I'm not opposed to Mr. Borek or his operation.

Q. And did he say it was a free country and each salesman [45] could do as he wished, didn't he?

A. Now you are asking me something I would have to lie about. I don't want to lie.

Q. Don't lie, if you can recollect it.

A. As far as I am concerned, Mr. Borek, as I said before, did not lay a stone in my way, nor did I hear him make a statement to any of the men that he disagreed with the union.

# Appendix (Part 8)

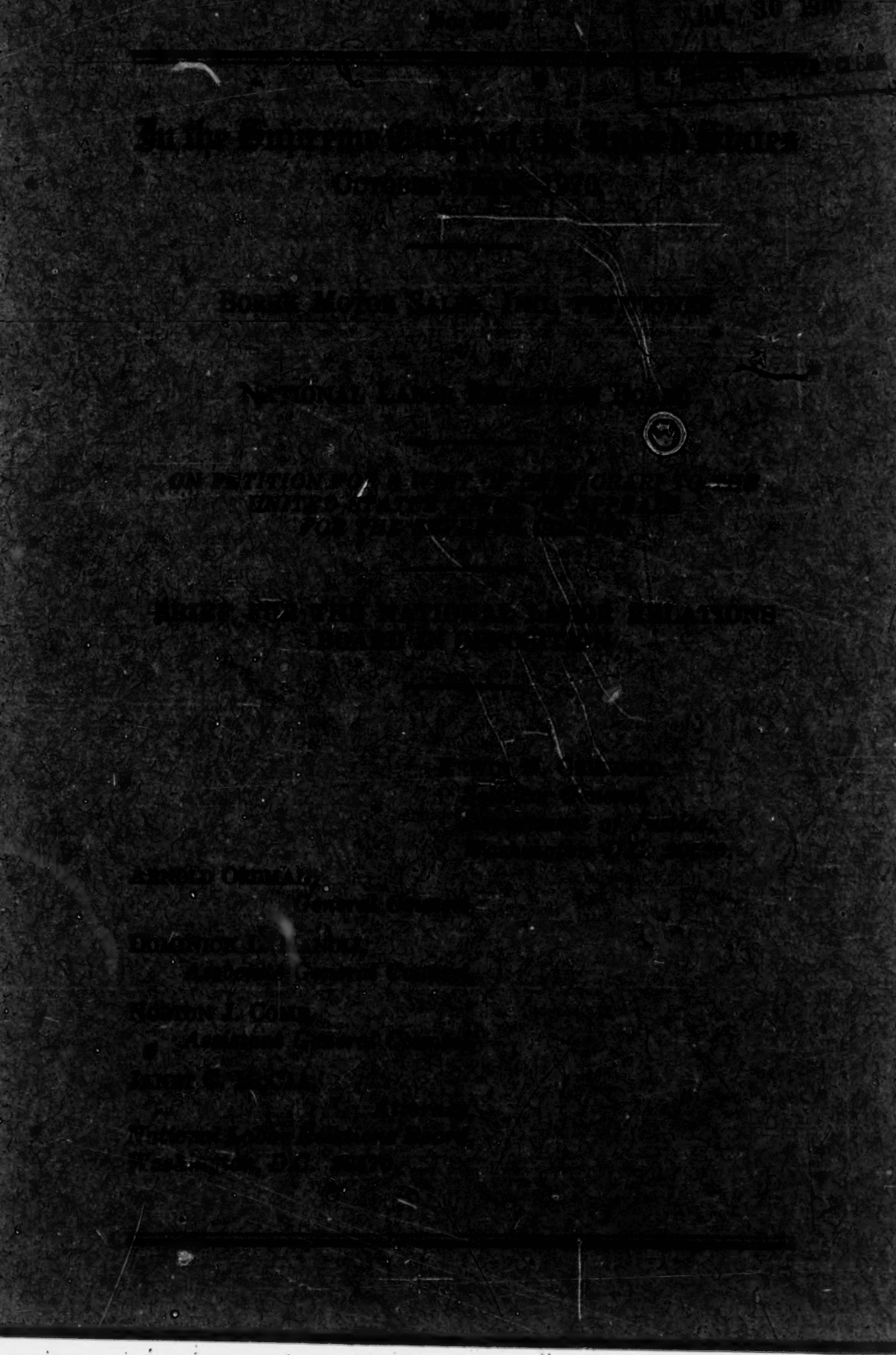
## RESPONDENT'S EXHIBIT NO. 3.

* DELIVERIES OF NEW AND USED AUTOS BY SALESMEN AT BOREK MOTOR SALES, INC.

| | Sept.18,1967 Through Sept.30,1967 | Oct. 67 | Nov. 67 | Dec. 67 | Totals |
|---|---|---|---|---|---|
| Ralph Teeter (Hired 9/15/67) | 0 new<br>0 used | 5 new<br>2 used | 8 new<br>1 used | 8 new<br>2 used | 21 new<br>5 used |
| Ralph Ambriz | 6 new<br>2 used | 19 new<br>5 used | 19 new<br>2 used | 10 new<br>2 used | 54 new<br>11 used |
| Ivis Chambers | 1 new<br>1 used | 1 new<br>17 used | 2 new<br>10 used | 1 new<br>6 used | 5 new<br>34 used |
| Howard Riley | 11 new | 12 new<br>1 used | 14 new<br>4 used | 10 new<br>0 used | 47 new<br>5 used |
| Sam Conti (Hired 10/9/67) | | | 3 new | 7 new | |
| Richard Malm (Involy.Term. 10/11/67) | 6 new<br>0 used | 1 new | | | |
| Jim Rachford (Vol'y.Term. 10/25/67) | 6 new<br>2 used | 1 new | 4 new | | |
| ** Wayne Sargent (Vol'y.Term. 10/9/67) | 5 used | | | | |
| TOTALS | | | | | |
| New | 35 | 39 | 50 | 36 | |
| New- Fleet, House and Manager Sales | 14 | 15 | 9 | 13 | |
| Total New | 46 | 54 | 59 | 49 | |
| Used | 8 | 25 | 17 | 10 | |
| Used- House and Manager Sales | 9 | 6 | 1 | 5 | |
| Total Used | 17 | 31 | 18 | 15 | |

* Figures based on Borek Motor Sales, Inc. Commission Sheets.

** Part-time Auto Salesman.



# In the Supreme Court of the United States

OCTOBER TERM, 1970

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No. 250

BOREK MOTOR SALES, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-47a) enforcing the Board's order is reported at 425 F. 2d 677. The Board's decision and order (Pet. App. 1a-20a, 34a-36a) are reported at 173 NLRB No. 155.

### JURISDICTION

The judgment of the court of appeals was entered on May 13, 1970 (Pet. App. 48a). The petition for

a writ of certiorari was filed on June 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the employer discharged one of its employees because of his union activity.

2. Whether the discharge was privileged because the union, on whose behalf the employee was organizing, stated that it would seek to incorporate a "price-fixing" arrangement in any collective bargaining agreement ultimately negotiated with the employer.[1]

3. Whether the Board was required to give specific reasons for overruling each of the employer's many exceptions to the Trial Examiner's recommended decision.

## STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 219 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 49a) and as follows:

Sec. 2. When used in this Act—

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or em-

[1] This question presents the same basic issue as that involved in a companion case, *Schmerler Ford, Inc.* v. *National Labor Relations Board*, No. 249, this Term.

ployee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

## STATEMENT

In November 1967, the Union [2] delivered union literature and authorization cards to one of petitioner's salesmen, who distributed them to his fellow salesmen at the Company showroom in Blue Island, Illinois (the Company is an automobile dealer) (Pet. App. 1a-2a, 4a-6a, 34a-36a; R. 13; 88-89).[3] General Manager Farino emerged from his office, was told the men were reading "union literature," and reached for the material in Salesman Ralph Teeter's hand (Pet. App. 6a, 34a; R. 13-14; 88-89). When Teeter said, "Just a minute, I want to read it," Farino replied, "Let me know if you are thinking about signing this [union card] and I'll fire you" (Pet. App. 6a, 34a; R. 14-20, 77; 89, 103-104, 114-115).

Teeter signed a union card, and mailed it and the cards signed by the other salesmen to the Union (Pet. App. 6a-8a; R. 14-16; 90-92, 104-105, 116-117, 197). A Union meeting, held on January 7, 1968, was attended by five Company salesmen, including Teeter (Pet. App. 12a-14a; R. 20-22, 93, 106, 117-118).

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[2] American Federation of Professional Salesmen, Local 5056, unaffiliated.

[3] "R." refers to the joint appendix filed in the court below.

General Manager Farino asked one of the salesmen, the day before the meeting, when and where it was to be held. The day after the meeting, Farino was told by another salesman that there had been a meeting the previous evening "to organize a union." (Pet. App. 13a; R. 20-22; 86-87, 92-93, 150.) On the evening of January 8, Farino discharged Teeter because he "wasn't selling enough cars." Teeter protested that he was "only three cars behind the top man." (Pet. App. 14a; R. 22-24; 118-119, 159-160.)[4]

The Board, adopting the Trial Examiner's decision, found that petitioner had violated Section 8(a)(1) of the Act by threatening Teeter with discharge if he signed a union card and Section 8(a)(3) by discharging him because of his union activity (Pet. App. 12a, 16a, 34a-36a). The Board also found that the Union was a labor organization within the meaning of Section 2(5) of the Act, rejecting petitioner's argument that the Union should be denied the Board's processes because of an allegedly illegal "price-fixing" scheme it had proffered at one time (Pet. App. 35a).[5]

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[4] Although ill from about Christmas 1967 until early January 1968, Teeter was actually only two delivered cars behind the top salesman in December. Farino had been "quite pleased" with Teeter four months earlier, and, following Teeter's initial interview, he was "so excited" by Teeter's 23 years of experience as a "trained professional automobile salesman" that he "wanted to start him the next day" (R. 12-13; 81-82, 113, 155, 165).

[5] Petitioner contended that, although the Union might technically fulfill the statutory requirements of a "labor organization," the Board should not lend its processes to such an organization because it was engaged in a "bold conspiracy" to

The Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate Teeter to his former or equivalent position, to make him whole for any loss of earnings suffered as a result of the Company's unlawful action, and to post an appropriate notice (Pet. App. 18a-20a, 36a).

The court of appeals (Judge Hastings dissenting) sustained the Board's findings and enforced the Board's order (Pet. App. 37a-47a).

## ARGUMENT

1. Petitioner's basic contention (Pet. 12-14) is that the Board erred in finding that the Company's discharge of employee Teeter was motivated by his

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violate Federal antitrust laws (Pet. App. 3a). In support of its contention, petitioner relied solely on discussions in a union meeting of January 28, 1968, respecting a possible pricing formula to be proposed to employers in contract negotiations (Pet. App. 3a-4a, 34a-35a). THE BOARD STATED

> Assuming arguendo, as [petitioner] maintains, that the [Union]'s proposed bargaining platform is a blueprint for an unlawful price-fixing conspiracy, any employer confronted with such a bargaining proposal would be free to reject it and could not be compelled to do otherwise. Moreover, so far as the record shows, the [Union] has not predicated its existence on its ability to obtain these allegedly unlawful price-fixing agreements from employers; it has merely indicated that it considers such agreements to be a means, albeit a preferred one, of securing employee benefits. In view of these circumstances, we can perceive no statutory justification for refusing to accord the [Union] recognition as a labor organization under Section 2(5) * * *. [Pet. App. 35a.]

union activities, rather than by his poor sales performance, as urged by the Company. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[6] In any event, the evidence summarized above amply supports the Board's finding that petitioner's asserted reason for Teeter's termination "was merely a pretext" and that the real reason for that action was his active union involvement (Pet. App. 16a, 34a).

2. Petitioner's contention (Pet. 8-9) that employee Teeter's activities on behalf of the Union were, in any event, not protected by the Act because of the Union's allegedly illegal "price-fixing" scheme presents the same basic issue as that involved in *Schmerler Ford, Inc.* v. *National Labor Relations Board*, petition for certiorari pending, No. 249, 1970 Term. We refer the Court to the Board's Brief in Opposition in *Schmerler* for a complete statement of our reasons for believing that that issue does not warrant review by this Court. See also Pet. App. 44a-45a.

3. Finally, petitioner contends (Pet. 10-12) that the Board violated Section 557(c) of the Administrative Procedure Act[7] by failing to state its reasons for

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[6] Judge Hastings' dissent likewise rests on an evidentiary issue. Thus, reading the record differently than did the Board and the court majority, he concluded that Teeter was discharged "for valid, well supported economic reasons" and that neither the Section 8(a)(1) nor 8(a)(3) violations are "supported by substantial evidence" (Pet. App. 47a).

[7] That Section provides in pertinent part (5 U.S.C. § 557(c)):

[Footnote continued on page 7]

overruling each exception pertaining to the discriminatory discharge issue. As the court below properly noted, however, the Administrative Procedure Act in terms "only requires the Board to rule on each exception, not to state the reasons therefor" (Pet. App. 43a). As the court added (*ibid*): "The Board indicated that it passed upon each exception presented by the Company. Some exceptions were discussed in the decision; the others obviously were overruled, for the Board adopted 'the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.'"

The cases petitioner cites (Pet. 11) are distinguishable, since they involved situations where the Board failed fully to review its subordinate's decision or where the basis for the Board's ultimate decision was unclear. Here, the Board fully reviewed the Trial Examiner's decision and the exceptions thereto; to the extent that it overruled exceptions without specific discussion, it is clear that the Board merely adopted the findings and conclusions articulated by the Examiner.

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[7] [Continued]

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; * * *.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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